FOR ARGUMENT

Supreme Court, U.S.
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No. 02-1747

IN THE
Supreme Court of The United States

CONGRESSMAN RON PAUL, GUN OWNERS OF AMERICA, INC., GUN OWNERS OF AMERICA POLITICAL VICTORY FUND, REALCAMPAIGNREFORM.ORG, CITIZENS UNITED, CITIZENS UNITED POLITICAL VICTORY FUND, MICHAEL CLOUD, AND CARLA HOWELL,
Appellants,

v.

FEDERAL ELECTION COMMISSION, *ET AL.*,
Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANTS CONGRESSMAN RON PAUL, *ET AL.*

HERBERT W. TITUS
TROY A. TITUS, P.C.
5221 Indian River Road
Virginia Beach, VA 23464
(757) 467-0616

WILLIAM J. OLSON*
JOHN S. MILES
WILLIAM J. OLSON, P.C.
Suite 1070
8180 Greensboro Drive
McLean, VA 22102
(703) 356-5070

Attorneys for Appellants
**Counsel of Record*

July 8, 2003

(Counsel continued on inside front cover)

RICHARD O. WOLF
MOORE & LEE, LLP
1750 Tysons Boulevard
Suite 1450
McLean, VA 22102
(703) 506-2050

GARY G. KREEP
U.S. JUSTICE FOUNDATION
Suite 1-C
2091 East Valley Parkway
Escondido, CA 92027
(760) 741-8086

PERRY B. THOMPSON
629 High Knob Road
Front Royal, VA 22630
(540) 305-0012

QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court erred by dismissing appellants' freedom of the press challenge to various provisions of BCRA, and to provisions of FECA amended by BCRA, on the ground that, in the area of campaign finance regulation, the freedom of the press guarantee in the First Amendment to the United States Constitution contains no greater rights than those protected by the guarantees of free speech and association?

2. Whether the district court erred by upholding the statutory exemptions in BCRA enjoyed by the "institutional press" and other FEC-licensed press activities from the prohibitions against, and regulations of, electioneering communications and contribution limits governing appellants, on the ground that Congress may, regardless of the freedom of the press guarantee, grant greater rights to the "institutional press" than to the "general press," only the latter of which appellants are a part?

3. Whether the district court erred by holding that, regardless of the constitutional guarantee of the freedom of the press, the fall-back definition of electioneering communication in Title II of BCRA (as modified by the court) and the accompanying prohibitions and regulations are constitutional as applied to appellants as members of the "general press," even though the institutional press and other FEC-licensed press activities are exempted?

4. Whether the district court erred by holding that, regardless of the constitutional guarantee of the freedom of the press, those appellants who are federal officeholders and/or candidates for federal office must, as members of the "general press," submit to the Federal Election Commission's licensing power and editorial control as provided for in BCRA § 101(a) (new FECA § 323(e)), including limiting their ability to assist

candidates and causes they support, whereas members of the "institutional press" are exempt?

5. Whether the district court erred by holding that, regardless of the freedom of the press, those appellants who are candidates for election to state office, must, as members of the "general press," submit to the licensing power and editorial control of the Federal Election Commission as provided for in BCRA § 101(a) (new FECA § 323(f)), if they refer to a candidate for federal office and the Federal Election Commission determines this to constitute promotion or support, whereas members of the "institutional press" are exempt?

6. Whether the district court erred by holding that, regardless of the freedom of the press, appellant Congressman and candidates for federal office, being members only of the "general press," had no standing to challenge the constitutionality of BCRA § 307(a) limiting individual contributions to federal election campaigns, and mandating disclosure of contributor identities and donations, despite the impact of such limits upon the editorial function of their campaigns for federal office, and by dismissing appellant candidates' press challenge to such statutory limits and requirements?

PARTIES TO THE PROCEEDING

The appellants in this case, who were plaintiffs in Civil Action No. 02-CV-781 below before the district court, are: Congressman Ron Paul; Gun Owners of America, Inc.; Gun Owners of America Political Victory Fund; RealCampaignReform.org; Citizens United; Citizens United Political Victory Fund; Michael Cloud; and Carla Howell.

The appellees in this case, who were defendants or intervenor-defendants below, are: Federal Election Commission; the United States of America; Senator John McCain; Senator Russell Feingold; Representative Christopher Shays; Representative Martin Meehan; Senator Olympia Snowe; and Senator James Jeffords.

This case was consolidated below with ten other civil actions challenging the constitutionality of certain BCRA provisions.

The names of plaintiffs in each of the consolidated cases are as follows:
National Rifle Ass'n v. FEC: National Rifle Association of America (NRA) and NRA Political Victory Fund;
McConnell v. FEC: U.S. Senator Mitch McConnell, former U.S. Representative Bob Barr, U.S. Representative Mike Pence, Alabama Attorney General William H. Pryor, Libertarian National Committee, Inc., American Civil Liberties Union, Associated Builders and Contractors, Inc., Associated Builders and Contractors Political Action Committee, Center for Individual Freedom, Club for Growth, Inc., Indiana Family Institute, Inc., National Right to Life Committee, Inc., National Right to Life Educational Trust Fund, National Right to Life Political Action Committee, National Right to Work Committee, 60-Plus Association, Inc., Southeastern Legal Foundation, Inc., U.S. English d/b/a/ ProENGLISH, Thomas

McInerney, Barret Austin O'Brock, and Trevor M. Southerland;

Echols v. FEC: Emily Echols, Daniel Solid, Hannah McDow, Isaac McDow, Jessica Mitchell, Daniel Solid, and Zachary C. White;

Chamber of Commerce v. FEC: Chamber of Commerce of the United States, U.S. Chamber Political Action Committee, and National Association of Manufacturers (Plaintiff National Association of Wholesaler-Distributors withdrew);

National Ass'n of Broadcasters v. FEC: National Association of Broadcasters;

AFL-CIO v. FEC: AFL-CIO and AFL-CIO Committee on Political Education and Political Contributions;

Republican National Committee v. FEC: Republican National Committee (RNC), Mike Duncan, former Treasurer, current General Counsel, and Member of the RNC, Republican Party of Colorado, Republican Party of New Mexico, Republican Party of Ohio, and Dallas County (Iowa) Republican County Central Committee;

California Democratic Party v. FEC: California Democratic Party, Art Torres, Yolo County Democratic Central Committee, California Republican Party, Shawn Steel, Timothy J. Morgan, Barbara Alby, Santa Cruz County Republican Central Committee, and Douglas R. Boyd, Jr.;

Adams v. FEC: Victoria Jackson Gray Adams, Carrie Bolton, Cynthia Brown, Derek Cressman, Victoria Fitzgerald, Anurada Joshi, Nancy Russell, Kate Seely-Kirk, Peter Kostmayer, Rose Taylor, Stephanie L. Wilson, California Public Interest Research Group (PIRG), Massachusetts Public Interest Research Group, New Jersey Public Interest Research Group, United States Public Interest Research Group, the Fannie Lou Hamer Project, and Association of Community Organizers for Reform Now; and

Thompson v. FEC: U.S. Representatives Bennie G. Thompson and Earl F. Hilliard.

The names of other defendants in the consolidated cases are as follows: Federal Communications Commission; John D. Ashcroft; in his capacity as Attorney General of the United States; United States Department of Justice; and David M. Mason, Ellen L. Weintraub, Danny L. McDonald, Bradley A. Smith, Scott E. Thomas, and Michael E. Toner, in their official capacities as Commissioners of the Federal Election Commission.

STATEMENT PURSUANT TO RULE 29.6

Appellant Gun Owners of America Political Victory Fund, a political committee, is a separate segregated fund of appellant Gun Owners of America, Inc., a nonprofit, nonstock corporation, and appellant Citizens United Political Victory Fund, a political committee, is a separate segregated fund of appellant Citizens United, a nonprofit, nonstock corporation. Otherwise, none of the appellants has a parent corporation. None of the appellants is a stock company, and no publicly held company owns 10 percent or more of the stock of any of the appellants.

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OPINIONS BELOW

The three-judge district court issued its judgment, along with four opinions which were filed on May 2, 2003: a *per curiam* opinion joined by two of the judges, and individual opinions by each of the three judges. The opinions are reported at 203 U.S. Dist. LEXIS 7816. Pursuant to this Court's Order of May 15, 2003, the appellants submitted jointly the district court's opinions, in the form of a Supplemental Appendix to the Jurisdictional Statement (hereinafter "Supp. App.").

JURISDICTION

The district court issued its opinions and judgment on May 2, 2003. Appellants timely filed their Notice of Appeal on May 7, 2003. This Court has appellate jurisdiction pursuant to § 403(a)(3) of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, 114. Appellants filed their Jurisdictional Statement on May 30, 2003, and this Court noted probable jurisdiction on June 5, 2003. Appellants' Notice of Appeal is reprinted at Paul Plaintiffs' Jurisdictional Statement, Jur. St. App. 1a.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution is reprinted at Paul Plaintiffs' Jurisdictional Statement, Jur. St. App. 5a.

Sections 434 and 441a of Title 2 of the United States Code (FECA prior to BCRA's amendments), are set forth at Paul Plaintiffs' Jurisdictional Statement, Jur. St. App. 6a.

The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002), is reprinted at Paul Plaintiffs' Jurisdictional Statement, Jur. St. App. 27a.

STATEMENT OF THE CASE

BCRA was signed into law on March 27, 2002. Eleven separate complaints were filed in the United States District Court for the District of Columbia challenging its constitutionality. The cases were consolidated by the three-judge panel assigned to hear them, and the parties were ordered to conduct discovery and submit their cases-in-chief, supporting briefs and opposition and reply briefs on an expedited basis over the course of approximately six months. The fully-submitted cases were argued before the court below on December 4-5, 2002. On May 2, 2003, the district court issued four separate opinions — a *per curiam* opinion and an opinion of each of the three judges on the panel — upholding certain BCRA provisions, striking down certain other BCRA provisions, and dismissing challenges to certain other BCRA provisions for nonjusticiability and lack of standing. *See* Supp. App.

The Paul Plaintiff appellants relied exclusively upon the freedom of the press in their arguments, rather than invoking the free speech and association guarantees relied on in Buckley v. Valeo, 424 U.S. 1 (1976), and by the other plaintiffs below.

To establish that FECA/BCRA violates their freedom of the press, the Paul Plaintiffs introduced substantial fact and expert testimony. These witnesses provided testimony and expert reports to establish that political campaigns and public interest advocacy involve traditional press activities and that FECA/BCRA interfere with these press activities in a number of significant ways. *See, e.g.*, Declarations of Congressman Ron Paul, Michael Cloud, and Carla Howell, and Reports of Paul Plaintiffs' Expert Witnesses James C. Miller III, Perry

Willis, and Walter J. Olson, in the Appendix hereto ("App.").[1] In particular, for example, the Paul Plaintiffs demonstrated that the FECA/BCRA licensing, reporting, and expenditure limitations, together with their contribution limits, have adversely affected Congressman Paul's federal election campaigns, as well as those of federal and state candidates Michael Cloud and Carla Howell, and will continue to do so. *See, e.g.*, Paul Decl. ¶¶ 16-18, App. 75a-76a, Cloud Decl. ¶¶ 6-30, App. 83a-95a, Howell Decl. ¶¶ 4-21, App. 96a-103a, Miller Rep. at 13-27, App. 21a-39a, Willis Rep. ¶¶ 7-11, App. 49a-56a, Olson Rep. ¶ 116, App. 68a-69a. The Paul Plaintiffs also established, *inter alia*, that FECA/BCRA inhibits both challengers to incumbent members of Congress and the growth of minor parties. *See, e.g.*, Cloud Decl. ¶¶ 7-13, App. 83a-88a, Howell Decl. ¶¶ 9-13, 20-21, App. 98a-100a, 103a, Miller Rep. at 8-13, App. 16a-23a, Willis Rep. ¶¶ 9-14, App. 52a-62a. Moreover, the Paul Plaintiffs demonstrated, *inter alia*, that, at least with regard to the passage of FECA, and that by the time BCRA was passed, the incumbent-protecting effect of this kind of regulation was discussed in Congress. *See, e.g.*, Statement of Sen. McConnell, 148 Cong. Rec. S3131-3132 (daily ed. Mar.

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[1] The Paul Plaintiffs demonstrated their functions as independent and effective "presses" — developing and implementing editorial policy, as well as researching, drafting, editing, publishing, and even withholding news stories, editorials, and commentaries on both public policy issues and federal election campaigns and candidates. The Paul Plaintiffs extensively publish through press releases, unpaid appearances on radio and television news, talk, and other shows, through paid political advertisements in newspapers and on radio and television, and through their own outlets — faxes, e-mail, web sites, direct mail, newsletters, bumper stickers, video and audio tapes, telephone calls, door-to-door campaigning, speeches, debates, and even a syndicated radio show. *E.g.*, Paul Decl. ¶¶ 13-15, App. 72a-74a; Willis Rep. ¶¶ 7, 8, App. 49a-52a; Lizardo Decl. ¶ 5, App. 78a; Bossie Decl. ¶¶ 3, 5; Pratt Decl. ¶¶ 3, 5, 9; Babka Decl. ¶¶ 4, 7, 9, Rec. No. 60.

29, 2001); Statement of Rep. Ney, 148 Cong. Rec. H348 (daily ed. Feb. 13, 2002).[2]

The evidence introduced by the Paul Plaintiffs was not challenged by the defendants, and apparently was accepted by the court below. There is no apparent factual dispute, and the Paul Plaintiffs' claims were rejected as a matter of law. Supp. App. at 99sa-105sa, 158sa-59sa, 460sa, 472sa-75sa and 1144sa-46sa. This case fundamentally concerns whether the constitutional guarantee of freedom of the press applies to the Paul Plaintiffs, and, if so, whether that guarantee precludes the challenged governmental restrictions, embodied in BCRA/FECA, of the Paul Plaintiffs' press activities.

SUMMARY OF ARGUMENT

The Paul Plaintiffs challenge the constitutionality of various provisions of the BCRA-amended FECA under the freedom of the press. Although it recognized the distinctiveness of the Paul Plaintiffs' challenge, the district court dismissed it, erroneously ruling that the freedom of the press imposes no limits upon campaign finance regulations different from those imposed by free speech and association. Deferring to congressional representations that the BCRA-amended FECA prevents "corruption and appearance of corruption," the court applied the strict scrutiny and intermediate scrutiny tests set forth in Buckley v. Valeo on the erroneous assumption that Buckley and its progeny precluded consideration of the Paul Plaintiffs' freedom of the press claims.

The record below unmistakably demonstrates that the BCRA-amended FECA increases the advantages that FECA granted to

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[2] The Paul Plaintiffs' evidence below is set out in more detail in their Jurisdictional Statement to the Court, Jur. St. at 3-14.

incumbents over challengers. Because campaign finance regulations implicate congressional self-interest, the normal rule of judicial deference to the constitutional judgment of Congress does not apply. Claims that such statutes have been enacted to prevent "corruption and appearance of corruption" remain undefined and constitutionally suspect. Insofar as Buckley has spawned the loose use of such terms, it ought to be overruled, or set aside, having failed to provide bright-line rules governing the marketplace of ideas related to federal elections.

The freedom of the press provides such bright-line rules. According to this Court's precedents, the freedom of the press: (1) bans congressional licensing of the publication and dissemination of ideas; (2) constrains Congress from imposing prior restraints upon such publication and dissemination except under the most extraordinary circumstances; (3) prohibits Congress from authorizing government officials to exercise the editorial function in such publication and dissemination; (4) forbids Congress from forcing the disclosure of the identities of publishers and disseminators; and (5) proscribes Congress from placing discriminatory economic burdens upon some such publishers and disseminators, and not others. Enforcing these freedom of the press constraints upon Congress is the only way to protect the people from government corruption, and it is not subject to any override by an asserted compelling government interest.

Subjecting the BCRA-amended FECA to analysis under the freedom of the press reveals that the Title II prohibitions and regulations of "electioneering communications" violate all five press standards. New FECA § 323(e) and § 323(f), created by Title I of BCRA, impose like unconstitutional restrictions. Section 323(e) imposes unconstitutional editorial control over federal officeholders and candidates; Section 323(f) imposes unconstitutional editorial control over state and local

officeholders and candidates. Finally, the Paul Plaintiffs have standing to challenge the contribution limits imposed by BCRA-amended FECA § 307, which together with the individual and PAC contribution limitations of FECA § 441a and their companion disclosure requirements contained in FECA § 434, impose unconstitutional editorial control upon candidates and their campaigns. All should be struck down.

ARGUMENT

I. THE CUSTOMARY DEFERENCE ACCORDED TO THE CONSTITUTIONAL JUDGMENT OF CONGRESS DOES NOT APPLY IN THIS CASE.

Ordinarily, this Court, when called upon to judge the constitutionality of an act of Congress, "accords great weight to the decisions of Congress," even in cases presenting First Amendment challenges. CBS v. Democratic National Committee, 412 U.S. 94, 102 (1973). *Accord* Rostker v. Goldberg, 453 U.S. 57, 64 (1981). Such deference to the constitutional judgment of Congress does not, however, apply in every case. For example, as explained by Justice Scalia in Morrison v. Olson, 487 U.S. 654 (1988), this Court did not invoke the "caution that we owe great deference to Congress' view that what it has done is constitutional" in assessing the constitutionality of the independent counsel law, because "where the issue pertains to separation of powers, and the political branches are ... in disagreement, neither can be presumed correct." Indeed "[a]s one of the **interested** and coordinate parties to the underlying constitutional dispute, Congress, no more than the President, is entitled to the benefit of the doubt." *Id.* at 704-05 (Scalia, J., dissenting) (emphasis added).

This Court did not extend deference to the constitutional judgment of Congress in Powell v. McCormack, 395 U.S. 486 (1969), in a dispute over the extent of congressional power to exclude a person from Congress by the exercise of its power to "judge ... the qualifications of its own members," recognizing that Congress had an institutional **self-interest** in an expansive interpretation of such power, an interpretation that was, also, in direct conflict with "a fundamental principle of our representative democracy ... 'that the people should choose whom they please to govern them,'... [a] principle [that] is undermined as much by limiting whom the people can select as by limiting the franchise itself." *Id.* at 541-47.

Similarly, Congress is an interested party with respect to the Bipartisan Campaign Reform Act of 2002 ("BCRA"), 116 Stat. 81 (2002), and the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431, *et seq.* ("FECA"), that it amends. In both acts, Congress has crafted rules governing the process by which monies may be raised and spent to challenge Congressmen for **re-election**, a preeminent concern — if not **the preeminent concern** — of each member of Congress. As Chief Justice Burger observed in Buckley v. Valeo. 424 U.S. 1 (1976):

> I see grave risks in legislation, enacted by incumbents of major political parties, which distinctively disadvantages minor parties or independent candidates. This Court has, until today, been particularly cautious when dealing with **enactments that tend to perpetuate those who control legislative power**. *See* Reynolds v. Sims, 377 U.S. 533, 570 (1964).... [Buckley, 424 U.S. at 251 (Burger, C.J., concurring and dissenting) (emphasis added).]

Further, this Court ruled that a legislature's failure to consider the interests of minor parties creates a need for courts to do so. "[B]ecause the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decision making may warrant **more careful judicial scrutiny**." Anderson v. Celebrezze, 460 U.S. 780, 793 (1983) (emphasis added). This rule should also be applied to acts of the United States Congress when the rights of minor party candidates are in question.[3]

A. BCRA/FECA Advantages Incumbents.

A campaign against an incumbent is not a fair fight. Incumbents enjoy a great advantage over challengers simply because their names are already well known and they have immediate access to the media due to their position. Other tangible benefits of incumbents had a total value between $1,823,086 and $3,144,999 in 1999 for each U.S. senator. Cloud Decl. ¶¶ 12-13, App. 85a-88a. *See also* Miller Rep. at 8-24, App. 16a-36a; Willis Rep. ¶¶ 10-13, App. 53a-61a; Buckley at 31. FECA/BCRA builds on these natural advantages of

[3] The political harm suffered by minor parties under FECA/BCRA are cogently demonstrated by the Willis Rep. ¶¶ 4-10, App. 44aa-55a; Miller Rep. at 8-27, App. 16a-39a; Cloud Decl. ¶¶ 6-30, App. 83a-95a; and Howell Decl. ¶¶ 4-21, App. 96a-103a. The need for this additional protection of minor parties is apparent when one considers their importance to our political system. "There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." Williams v. Rhodes, 393 U.S. 23, 32 (1968). *See also* Sweezy v. New Hampshire, 354 U.S. 234 (1957). "All political ideas cannot and should not be channeled into the programs of our two major parties.... Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society." *Id.* at 250-51.

incumbency in numerous ways to the virtual destruction of a fair and open system of elections.

Economist, former Chairman of the Federal Trade Commission and Director of the Office of Management and Budget, James C. Miller III, Ph.D., who testified as an expert witness for the Paul Plaintiffs, has analyzed the manner in which political campaigns resemble commercial markets and incumbent politicians resemble monopolists. He found that any regulation which limits fundraising or spending harms challengers more than incumbents because challengers benefit more than incumbents from each dollar spent on their campaign. In economic terms, challengers receive a higher marginal utility for each dollar spent. Miller Rep. at 17, App. 27a. Because of the anti-competitive nature of fundraising/spending limits, the major effect of FECA has been to protect incumbents from challengers. *Id.* at 16, App. 25a. In commercial markets, monopoly leads to higher profits, higher prices, lower quality, and less innovation. When incumbents are able to enjoy monopolistic powers, the effects on citizens and voters are like the effects of monopoly on consumers. The range of options is limited, the overall quality of service is diminished, accountability suffers, officials more frequently respond to vested interests rather than the electorate at large, deliberations are less transparent, and citizens have less information about the candidates, their qualifications, and their positions. *Id.* at 7-8, App. 15a-16a. Even a candidate who faces no serious threat of electoral defeat may wish to avoid challenge simply to avoid the criticism that challengers generally use in their campaigns against incumbents. Finally, when one party is unable to achieve a true **monopoly**, the **second choice** of the would-be monopolist is to form a **duopoly** with one other party, thus enjoying nearly all of the benefits of monopoly, and simply sharing them with one other group. However, like commercial trusts, political candidates

and parties have an incentive to break the agreement with their fellow conspirators. Thus, they **seek to enforce their anti-competitive agreements by law**. J. Miller, *Monopoly Politics* 40-42 (Hoover Inst. Stanford Univ.: 1999).

Perry Willis, the former national director of the Libertarian National Committee and an experienced political consultant and fundraiser, also served as an expert witness for the Paul Plaintiffs. He testified that polls show a significant number of Americans hold political beliefs that are best described as "libertarian." Willis Rep. ¶ 4, App. 44a-46a. However, in spite of public support, the discriminatory effects of federal campaign laws on minor parties make it virtually impossible for libertarians to be viable candidates for federal office.[4] *Id.* ¶¶ 4-5, App. 44a-48a. Challengers, especially minor party challengers, must rely on fewer sources of contributions than incumbents because many potential donors refuse to donate to challengers given the ever present threat of retribution from the incumbent. To overcome this disadvantage, challengers must rely on larger contributions from strong supporters who share their philosophical convictions, which FECA/BCRA's contribution limitation makes impossible. Moreover, because of the limited amount of money which can be accepted from each contributor, challengers must pay the costs to locate and communicate with a greater number of potential donors, thus spending less communicating their message to the general public. Incumbents, however, can easily and inexpensively convince large numbers of donors to contribute to the

[4] Additionally, the institutional media, which is exempted from FECA/BCRA, is uniformly biased against libertarian ideas. In an effort to counteract this bias, the primary aim of Libertarian campaigns is to serve as a press, educating the public about the policy options which are ignored by the mainstream press' focus on "conservative" versus "liberal" approaches. Willis Rep. ¶¶ 7-8, App. 49a-52a.

campaigns; thus, they are not harmed by contribution limits. *Id.* ¶¶ 9-12, App. 52a-58a. FECA/BCRA's reporting requirements also severely limit the ability of challengers, especially minor party challengers, to raise money because their greatest support comes from people who have philosophical or economic reasons to oppose the status quo. However, these are also people who tend to fear having the government learn of their efforts to change the status quo. Thus, many supporters of Libertarian campaigns donate $199 to avoid having their personal information reported. *Id.*, ¶ 13, App. 58a-61a.[5]

The anti-competitive provisions of FECA have been exponentially worsened by BCRA. For example, under BCRA, an American citizen can be sent to federal prison for five years for criticizing a member of Congress in the way that Congress has determined to be impermissible, and for a wide variety of other "offenses." FECA § 309(d)(1), Jur. St. App. at 69a. BCRA prohibits a member of Congress from signing a fundraising letter for a group that he or she supports to conduct issue advocacy or voter registration, and BCRA makes it virtually impossible for minor party candidates for federal and state office to run as a team to maximize their chance of gaining

[5] Judge Buckley of the U.S. Court of Appeals for the District of Columbia observed in 2000: "the argument is essentially between political insiders and political outsiders, as exemplified by the ideologically disparate group that joined Sen. Eugene McCarthy and me in challenging the constitutionality of the Campaign Reform Act of 1974. What we had in common was a concern that its **restrictions on spending and giving would effectively squeeze independent voices and political reform movements out of the political process** by making it even more difficult than it already was to raise effective challenges to the political status quo. The legislation was, in fact, so notoriously one-sided in this respect that it became known as the **Incumbent Protection Act**." Cato Policy Report, March/April 2000, p. 1, Corruption, Campaign Finance, and Term Limits, http://www.cato.org/pubs/policy_report/v22n2/buckley.html (emphasis added).

public attention and public support. FECA § 323(e) and (f), Jur. St. App. at 30a-33a. BCRA continues the FECA practice of severely limiting contributions by Americans to campaign committees, with an anemic, less-than-inflation increase in limitations, ensuring that effective challenges to incumbents will be virtually impossible. FECA § 315(a)(1), Jur. St. App. at 62a. BCRA continues and expands the FECA practice of compelling the disclosure of the identity of financial supporters so that incumbents may know the identity of those who would have the temerity to oppose them. 2 U.S.C. § 434(b)(3)(A), Jur. St. App. at 12a, and new FECA § 304(f), Jur. St. App. at 37a-41a. Few Americans can be expected to understand these restrictions or how they are to be applied to decisions made in the heat of an election campaign.[6]

In the face of the anti-competitive track record of FECA and the record below concerning BCRA, the time is right for this Court to entertain a broad challenge to the entire regulatory scheme for federal campaign finance.[7] Such a challenge is

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[6] BCRA makes FECA much more complex and difficult to work with. Even FEC employees often do not understand these restrictions. Paul Plaintiffs' expert witness Walter J. Olson, CPA, stated that, even though he is an experienced consultant in the area of campaign finance regulation, he frequently must call the FEC advice line. A number of times, the FEC information specialist he has spoken to has not been able to answer his questions. On occasion, FEC employees actually admit that they have no advice to give and Mr. Olson, as treasurer facing personal liability for FECA violations, must act at his own peril. Olson Rep. ¶ 8, App. 67a-68a.

[7] It is particularly important that the campaign finance reformers be checked now, because they have made it clear that even the restrictions in BCRA do not satisfy them. For example, before the House of Representatives had even voted on BCRA, Senator McCain declared "This new law does not resolve all of the problems of our campaign finance system — but it was a historic and **significant step** forward.... Those of us who believe deeply in these reforms will not falter in our efforts to ... **implement further reforms**

presented by the Paul Plaintiffs. Their challenge differs from the challenges of all others in this litigation in three ways: (1) the Paul Plaintiffs base their challenge on the press clause of the First Amendment rather than the speech and association clauses, or equal protection or due process; (2) the Paul Plaintiffs seek the re-examination and overturning of Buckley v. Valeo based on a real record, not just congressional self-serving promotionals upon which Buckley relied, although these plaintiffs believe that Buckley could simply be set aside; and (3) the Paul Plaintiffs challenge contribution limits and disclosure requirements not challenged by other parties and never before challenged on freedom of press grounds.

B. Claims of Corruption and the Appearance of Corruption Are Undefined and Mask a Constitutionally Illegitimate Purpose.

In this case, as in Buckley, the federal government and intervening members of Congress maintain that so-called reform is justified to combat "corruption and the appearance of corruption" in government, lest the people lose faith in their government officials and in their current system of government. *See* Defendants' Brief at 71-84 (Rec. No. 66). Rather than provide this Court with a precise definition of "corruption" and "appearance of corruption," they prefer to invoke those terms as "judicial mantras," hoping that by repetition this Court will simply accept the claims on the strength of this Court's normal practice of according deference to Congress. As pointed out

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in the future." McCain Declares Reform Crusade Continues, Press Release of John McCain, Nov. 14, 2001. His attitude is shared by his co-author of the Senate version of BCRA, Senator Feingold, who said, "[BCRA] is only a **first step** to cleaning up the system. There are **many provisions** we can consider **down the road**...." Statement of Sen. Feingold, 147 Cong. Rec. S2887 (daily ed. Mar. 26, 2001).

above, such deference should not be accorded Congress in this case because any presumption of constitutionality does not apply when Congress acts to protect itself and the current two-party system.

In Buckley, the Court was clear about what **it** meant by "corruption" — "large contributions ... given to secure political quid pro quo's from current and potential office holders." *Id.*, 424 U.S. 26. But this is not what BCRA's supporters meant by corruption. As FEC Commissioner Bradley Smith has written:

> What is meant by "corruption" in [the current "reform" debate] is not the common definition of the term, that is to say, personal enrichment of a legislator in exchange for a vote.... What reformers mean by "corruption" is that legislators react to the wishes of constituents; or what, in other circumstances, might be called "responsiveness." What makes this particular incidence of responsiveness "corrupt" is that the constituents involved have taken an active role in supporting the candidate's campaign for election.... In short, for at least some campaign regulation advocates, it appears that democracy itself is the problem. If individuals and groups are allowed to spend money campaigning, they might succeed in convincing voters to vote in certain ways; if they are allowed to lobby their representatives, they might persuade those representatives to support or oppose legislation. This "has really got to be changed." Democracy itself is corrupt. [B. Smith, *Unfree Speech* 52, 214 (Princeton Univ. Press: 2002).]

Although BCRA sponsors seek to define preventing the "appearance of corruption" as a compelling **governmental interest** justifying restrictions on the First Amendment rights of Americans, they are actually addressing a compelling **political interest** shared by all incumbents. When government is perceived as corrupt, it is the **incumbents**, not the challengers, who are at risk. Combating the "appearance of corruption," then, is a ruse designed by incumbents to justify limits on the freedoms of others to further their own interests.

Just two terms ago, this Court ruled that a state may not regulate the content of a campaign for elective judicial office without first defining specifically its goals. In Republican Party of Minn. v. White, 536 U.S. 765 (2002), this Court found that the claimed government interests of "preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary" did not survive careful scrutiny. *Id.* at 773. Likewise here, the Government should not be allowed to claim an interest in preventing "corruption and the appearance of corruption" without defining those terms with the same precision as required in the White case. This is especially important here, where the government candidly admits that its overarching goal is to preserve the people's "confidence" in the present system of representative government. *See* Buckley, 424 U.S. at 27. In the past, governments have attempted to achieve that same goal through laws prohibiting seditious libel, contending that the current government must have the power to preserve its reputation with the people, lest the people lose confidence in their government. *See* Rex v. Tutchin, Howell's State Trials 1095 (1704) (sustaining seditious libel prosecution on the theory that "it is very necessary for all governments that the people should have a good opinion of it." *Id.* at 1128). However, if it is constitutionally illegitimate for the government to pursue a seditious libel prosecution in order to protect the government's

reputation, as this Court ruled in New York Times v. Sullivan, 376 U.S. 254 (1964), then the government cannot protect the government's reputation by "preventive" measures such as those contained in BCRA/FECA, notwithstanding this Court's opinion in Buckley.

II. THE COURT BELOW ERRONEOUSLY DISMISSED THE PAUL PLAINTIFFS' CLAIMS UNDER THE FREEDOM OF THE PRESS.

Beginning with Buckley v. Valeo, and continuing through Federal Election Commission v. Beaumont, ___ U.S. ___, 123 S. Ct. 2200 (2003), this Court has never addressed a freedom of the press challenge to the Federal Election Campaign Act. For that reason alone, the *per curiam* opinion declined to determine the Paul Plaintiffs' challenges to BCRA under the freedom of the press. Supp. App. at 104sa. Additionally, the court below dismissed the Paul Plaintiffs' freedom of the press claims on the ground that the freedom of the press clause provides "no rights ... that are superior to or different than those under the other clauses of the First Amendment." *Id.* at 103sa-04sa. Thirdly, faulting the Paul Plaintiffs for failure "to provide the Court with a standard to apply" to their Press Clause claims,[8] the court below "appl[ied] the same scrutiny to all First

[8] The *per curiam* opinion criticized the Paul Plaintiffs also for failing "to ... delineate the additional, substantive rights provided under the First Amendment Freedom of the Press Clause." Supp. App. at 101sa, n.61. This simply is not correct. In the briefing below by the Paul Plaintiffs, the "substantive rights" guaranteed by the freedom of the press were addressed thoroughly, given the 30-, 20-, and 10-page limitations on briefs imposed by the district court (Order of Oct. 15, 2002, Rec. No. 51) (reduced from the Paul Plaintiff's request of 45, 30, and 25 pages.) *See* Initial Brief at 8-12, Rec. No. 65, Opposition Brief at 10-11, Rec. No. 73, and Reply Brief at 1-6. The distinct judicial standard applied to violations of the press freedom are set forth in the several subparts of Section II.B, *infra*.

Amendment claims, whether presented under the Speech or Press Clauses." Supp. App. at 102sa-03sa, 105sa. Finally, the court rejected the Paul Plaintiffs' freedom of the press claims on the ground that "[i]f the Press Clause affords greater or different rights, it might force the courts to make a distinction between the 'institutional' and 'general' press," which could prove difficult, if not impossible, under the freedom of the press guarantee." *Id.* at 104sa, n.65. The court erred on all four points.

A. The Paul Plaintiffs' Freedom of the Press Claims Are Not Barred by Buckley and Its Progeny.

The court below worried that, if the Paul Plaintiffs' press claims were addressed on the merits, then "litigants could besiege the courts with a host of challenges to laws previously upheld by [this] Court ... merely by characterizing themselves in their complaints as members of the 'press' because their purpose is to disseminate information to the public." *Id.* at 104sa. To be sure, no plaintiff should be permitted to camouflage a free speech or association claim by wrapping it in freedom of the press clothing in order to escape the strictures of *stare decisis*. But that is not what the Paul Plaintiffs have done. Rather, on the basis of the unchallenged facts concerning their press activities — ranging from publication of public information to campaigning for public office — they have asserted that they are entitled to the discrete protections of the freedom of the press — including the prohibitions against government licensing, prior restraints, editorial control, forced identity disclosure and discriminatory economic burdens — all of which are different from either the "strict scrutiny" or "intermediate scrutiny" protections enjoyed by the free speech and association claimants who previously litigated Buckley and its progeny. *See e.g.*, Amended Complaint §§ 41-45, App. at 1a-4a; Paul Plaintiffs' Proposed Findings of Fact §§ 12-20, 23-

49, App. 109a-120a. *See also* itemization of record evidence on press claims in Statement of the Case, *supra*, at 3-4.

Lack of a prior challenge to campaign finance laws based upon the freedom of the press guarantee is no bar to raising such a challenge now. If "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence" (Walz v. Tax Comm. of New York, 397 U.S. 664, 678 (1970)), then surely the government does not acquire immunity from constitutional violations just because they have not been brought to the attention of the courts in previous litigation that stretches back only 27 years. Indeed, the fact that no one had previously raised a claim that campaign finance regulation "interferes with First Amendment freedoms" did not preclude this Court from addressing such a challenge in Buckley. *See* Buckley, 424 U.S. at 13-14. *See also* New York Times v. Sullivan, 376 U.S. 254, 268 (1964) (previous statements by the Court that the Constitution does not protect libelous publications is no bar to constitutional challenge to libel of government).

B. The Freedom of the Press Is Subject to a Different and Higher Standard of Review.

The court below concluded that the Paul Plaintiffs' press claims were no different from those previously litigated in Buckley and its progeny, because, as a matter of law, there are "no rights under the Press Clause that are superior to or different than those under the other clauses of the First Amendment." Supp. App. at 103sa-04sa. Thus, it reasoned, because "the Press Clause has largely been subsumed into the Speech Clause," the Paul Plaintiffs' claims are subject to "the same scrutiny" as other "First Amendment claims," whether they be free speech or association. *Id.* at 102sa, 104sa. To

reach this conclusion, the court below disregarded a long line of this Court's precedents applying a higher and different standard of review to the freedom of the press.

The court below inferred from First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), that "in the context of an election law statute, as applied to a non-media corporation, the Supreme Court treated the Press and Speech Clauses as indistinct." Supp. App. at 103sa. This is a misreading of Bellotti. First, the bank plaintiff in Bellotti did not raise a freedom of the press claim, but limited its claims to violations of the freedoms of speech and association. Bellotti, 438 U.S. at 767, 771, 776-77, 780. Second, this Court **explicitly** characterized the bank's claim as one based upon the freedom of speech, without any reference whatsoever to any possible freedom of the press claim, and thus it applied the Buckley strict scrutiny test. *Id.* at 786-91. Third, although the Bellotti plurality referred to "press cases," this Court did not — contrary to the claim of the *per curiam* opinion below (Supp. App. at 103sa) — engage in a careful discussion of the freedom of the press, much less consider the bank's rights under the Press Clause to be indistinct from its claims under the Speech Clause. Rather, as Chief Justice Burger wrote in his concurring opinion, "[t]he meaning of the Press Clause, as a provision separate and apart from the Speech Clause, is implicated only indirectly by this case." Bellotti, 438 U.S. at 802.

No Licensing Standard. In his Bellotti concurrence, the Chief Justice proposed that the Press Clause, as distinguished from the Speech Clause, was designed to prohibit "official [government] restraints," such as "licensing, censors, indices of prohibited books, and prosecutions for seditious libel...." *Id.* at 795, 800. In particular, he noted that any effort to limit the reach of the Press Clause to "media corporations," as had been suggested by some, would run afoul of "the abhorred licensing

system of Tudor and Stuart England — a system that the First Amendment was intended to ban in this country." *Id.* at 801. To support this proposition, the Chief Justice cited Lovell v. Griffin, 303 U.S. 444 (1938), which found unconstitutional a city ordinance requiring a person to obtain a permit **before** disseminating literature because it "strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." *Id.* at 451. And the Court so ruled in Lovell without subjecting the ordinance to strict or other scrutiny to determine if the city had a compelling interest to impose its licensing system.

In Watchtower Bible and Tract Society v. Village of Stratton, 536 U.S. 150 (2002), this Court assessed the constitutionality of a licensing system requiring a mayoral permit **before** engaging in "door-to-door ... religious proselytizing [and] anonymous political speech and the distribution of handbills." *Id.* at 153. Relying primarily upon its "World War II-era cases" (*id.* at 164), including Lovell (*id.* at 161), it placed special emphasis upon Schneider v. State, 308 U.S. 147, 164 (1939), quoting therefrom as follows:

> [P]amphlets have proved the most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people. On this method of communication the ordinance imposes censorship, abuse of which engendered the struggle in England which eventuated in the establishment of the doctrine of the freedom of the press.... To require a **censorship through license** which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart

> of the constitutional guarantees. [Watchtower, 536 U.S. at 162 (emphasis added).]

The Watchtower Court then concluded that it was unnecessary to resolve the "standard of review ... assessing the constitutionality of this ordinance" — whether strict or intermediate or some lesser scrutiny — because "the breadth of speech affected by the ordinance and the **nature of the regulation**" offends "the very notion of a free society — that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so," notwithstanding the government's claimed countervailing interests of preventing fraud and other crime, or protecting privacy. *Id.* at 164-166 (emphasis added). In essence, this Court in Watchtower concluded that the ordinary free speech or association standards of strict or intermediate scrutiny do not apply to a law "requiring a permit" to engage in "everyday public discourse," even if "the issuance of permits ... is a ministerial task that is performed promptly." *Id.* at 166. In so ruling, this Court recognized that, even if a government official has absolutely no discretion not to issue a permit, any "statute purporting to license the dissemination of ideas" is inherently "evil," and therefore, unconstitutional on its face. Thornhill v. Alabama, 310 U.S. 88, 97 (1940).

Prior Restraint Standard. In addition to outlawing the licensing and censorship of publications and dissemination of ideas, the freedom of the press applies a more stringent standard than free speech to **previous** restraints upon publications. During their long tenures on this Court, Justices Black and Douglas concluded that **all** such restraints violated the freedom of the press. *See* New York Times Co. v. United States, 403 U.S. 713, 717, 720 (1971). Although their view never prevailed, the press doctrine of "no prior restraints" has laid

down a much higher standard than the strict scrutiny standard applied to free speech and association. In Near v. Minnesota, 283 U.S. 697 (1931), Chief Justice Charles Evans Hughes observed that "the chief purpose of the guaranty [of the liberty of the press is] to prevent previous restraints upon publication." *Id.* at 713. While the Chief Justice acknowledged that "the protection even as to previous restraints is not absolutely unlimited," he maintained that "only in exceptional cases" could the government impose such a restraint. *Id.* at 716. In the 1971 Pentagon Papers case, this Court ruled that "'any system of prior restraints ... bear[s] a heavy presumption against its constitutionality.'" New York Times, 403 U.S. at 714 (internal cites omitted). To overcome this presumption, it was not enough for the government to show a "compelling state interest." Rather, as Justice Brennan noted in a separate opinion, "only government allegation and proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order." *Id.* at 726-27. *See also id.* at 730-31.

No Government Editorial Control. Additionally, the freedom of the press posits editorial control in the people, not in the government. As Blackstone put it: "Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press." IV Blackstone's *Commentaries* at 151-52. Indeed, the very purpose of prohibiting the licensing of publications is to prevent government officials, executive, administrative, or judicial, from assuming the function of editors. *See* Near v. Minnesota, 283 U.S. at 711-17. As Justice Black put it in the Pentagon Papers case:

> In the First Amendment the Founding Fathers gave the free press the protection that it must have

> to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose the deception in government. [New York Times, 403 U.S. at 717.]

Thus, in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), a Florida right-to-reply statute was struck down as an unconstitutional intrusion upon the editorial function of newspaper, even though the statute, by requiring that a candidate for election to office have access to a monopoly news outlet to reply to charges against him, was designed to ensure a more fully informed electorate. *Id.* at 245, 258. This Court reasoned that, no matter how strong the interest of the state to counter the entrenched economic concentration of power in newspapers in order to "ensure that a wide variety of views reach the public," the freedom of the press guaranteed the private exercise of editorial discretion. *Id.* at 247-56. Thus, it is clear that the press guarantee of private editorial control is not subject to any overriding government interest, compelling or otherwise. *See id.* at 259-61 (White, J., concurring).

No Forced Identity Disclosure. Concomitant with the press guarantee of private editorial control is the right to publish and disseminate anonymously. As Justice Black opined in Talley v. California, 362 U.S. 60 (1960), the constitutional right to communicate anonymously is rooted, firstly, in the no licensing/no censorship principle of the freedom of the press, and only secondarily in the privacy protection afforded by the guarantee of free association. *See id.* at 62-65. While the

anonymity protection of free association may be subject to overriding state interests, where applicable, the anonymity protection of the freedom of the press is not. *Compare id.* at 62-65 *with id.* at 66 (Harlan, J., concurring) and *id.* at 69 (Clark, J., dissenting).

In Buckley v. Valeo, plaintiffs challenged the forced disclosure of the identities of contributors (publishers) of campaign literature **solely** on the ground that such disclosure violated the privacy protection afforded by free association. 424 U.S. at 11. Therefore, this Court analyzed FECA's forced disclosure provisions under the strict scrutiny standard applicable to free association anonymity claims. *See id.* at 64-68. After Buckley, this Court has had the opportunity to review forced disclosure laws on four occasions. Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982); McIntyre v. Ohio Elections Comm., 514 U.S. 334 (1995); Buckley v. Amer. Const. Law Found., 525 U.S. 599 (1999); and Watchtower v. Stratton, *supra.* In the Socialist Workers and American Constitutional Law Foundation cases, this Court applied the strict scrutiny test because the challenging parties had rested their anonymity claim upon freedom of association. Brown, 459 U.S. at 91-102; Amer. Const. Found., 525 U.S. at 200-05.

In McIntyre, however, an Ohio statute prohibiting the distribution of "anonymous campaign literature" was challenged as a violation of the freedom of speech. McIntyre, 514 U.S. at 336. In his majority opinion striking down the Ohio statute, Justice Stevens eschewed reliance on the privacy protection of free association, in favor of the free press principle of private editorial control, relying heavily upon Talley and Miami Herald. *Id.* at 341-45, 347-49. Although the majority claimed that it was applying "strict scrutiny" to the Ohio statute as in Buckley v. Valeo (*id.* at 347, 352-57), Justice

Scalia, in dissent, found the majority opinion's attempt "to distinguish Buckley unconvincing." *Id.* at 382-84 (Scalia, J., dissenting). Concurring with the majority, Justice Thomas discarded any attempt at strict scrutiny, finding the anonymity principle protected, without exception, in the freedom of the press. *Id.* at 359-71. *See also* Watchtower, 536 U.S. at 164.

No Discriminatory Economic Burdens. To confine the freedom of the press to freedom from licensing and censorship alone would be "too narrow a view of the liberty of the press." Grosjean v. American Press Co., Inc., 267 U.S. 233, 245-47 (1936). As the Grosjean Court observed, after the English monarchy gave up its licensing power to control the flow of information about the government, it turned to its taxing power to impose economic burdens upon "the publication of comments and criticisms objectionable to the Crown." *Id.* at 246. While the Parliament imposed stamp duties upon advertising revenue and printed publications "'avowedly for the purpose of repressing libels,'" in reality, "the dominant and controlling aim was to prevent, or curtail the opportunity for, the acquisition of knowledge by the people with respect of their government affairs." *Id.* at 247 (internal cites omitted). Writing in opposition to the infamous Stamp Act of 1765, John Adams noted that the Act imposed "restraints and duties" upon the press to "strip us in a great measure of the means of knowledge." J. Adams, "A Dissertation of the Canon and Feudal Law," reprinted in J. Adams, *The Revolutionary Writings of John Adams* 21, 34 (Liberty Fund, Indianapolis: 2000). According to Adams, such taxes transferred the wealth of the people to the government in violation of the freedom of the press which was rooted in the "divine right" of the people "to know ... the characters and conduct of their rulers." *Id.* at 28.

Anytime the government imposes an economic burden upon publications, whether by tax or regulation, the costs of publication increase, and where such an economic burden is discriminatorily placed upon some, and not others, it is a violation of the freedom of the press. Grosjean, 297 U.S. at 240-41, 250-51; Arkansas Writer's Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987) ("[O]fficial scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press."); Miami Herald, 418 U.S. at 256. ("The Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty resulting from the compelled printing of a reply exacted in terms of the cost in printing and composing time and materials...."). According to Grosjean and Miami Herald, the imposition of such a discriminatory economic burden is a *per se* violation of the freedom of the press.[9]

As Justice Frankfurter so forcefully put it:

[9] Despite these press precedents, the court below concluded that Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990), "settled" the question that, under the First Amendment, the government may impose discriminatory economic burdens on the "general press," as contrasted with the "'institutional' media," because "the [institutional] press' unique societal role ... provide[s] a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations." Supp. App. at 103sa, n.64. Such a reading of Austin is wholly unwarranted. In Austin, this Court did not even address the discriminatory strictures of the freedom of the press, much less, contrary to the court below's claim, "settle" the question that the "media exemptions" contained in BCRA and FECA are justified by a "compelling" state interest. *Id.* The Austin plaintiff raised no freedom of the press claim, relying instead upon free speech and equal protection. Austin, 494 U.S. at 657-58. Thus, this Court applied the strict scrutiny test of Buckley and the Equal Protection Clause's compelling state interest test to the plaintiff's claims (*id.* at 658-66, 666-68), not this Court's distinctive rules governing freedom of the press.

> [T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect **all persons** in their right to print what they will as well as to utter it. "[T]he liberty of the press is no greater and no less than the liberty of **every** subject of the Queen." *Regina v. Gray,* [1900] 2 *Q.B.* 36, 40, and in the United States, it is no greater than the liberty of **every** citizen of the Republic. [Pennekamp v. Florida, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring, emphasis added).[10]]

C. The Freedom of the Press Is Not a Subset of the Freedom of Speech.

In disregard of the rich legacy of the distinct and higher standard of review applied to the freedom of the press, the *per curiam* opinion decided that the freedom of the press had been "'subsumed into the Speech Clause.'" Supp. App. at 102sa. In doing so, the court below violated the first principle of constitutional interpretation, which commands that:

> In expounding the Constitution of the United States [citation omitted], **every word** must have its due force, and appropriate meaning; for it is evident from the whole instrument, that **no word** was unnecessarily used, or needlessly added. [Wright v. United States, 302 U.S. 583, 588 (1938) (emphasis added).]

[10] *Accord*, Lovell, 303 U.S. at 451-52; Bellotti, 435 U.S. at 781, n.17, 782, n.18, 790-91, n.30 (majority op.), and at 798-802 (Burger, C.J., concurring).

To rule that there is no real difference between the Speech and Press Clauses would not only undermine the integrity of the constitutional text, but would also rest upon a profound misreading of history of the two freedoms. Not only was the freedom of the press extended to the people a century before the freedom of speech,[11] but it was the freedom of the press, not the freedom of speech, that served as the American "palladium"[12] of liberty through the war for independence and into the late 18th century constitution-making. Thus, in the early state declarations of right, the freedom of the press was secured to the people,[13] but not the freedom of speech, the latter being secured only to the elected members of the state legislature assembled.[14] Whatever security the people enjoyed to speak freely came solely from the protection afforded by the freedom of the press.[15] Thus, according to this early history of the constitutional treatment of the freedoms of speech and of the

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[11] By the end of the 17th century, the liberty of the press was a right of all Englishmen (IV Blackstone's *Commentaries* at 152, n.a.), whereas the freedom of speech was enjoyed only by members of Parliament assembled. *English Bill of Rights, Declaration 9* (Dec. 16, 1689), reprinted in *Sources of Our Liberties* 247 (Perry, ed., Rev. ed., American Bar Foundation, Chicago: 1978) (hereinafter "*Sources*").

[12] *See* P. Payson, *A Sermon* (Boston, 1778), reprinted in I *American Political Writing during the Founding Era ("American Founding Era") 1760-1805* 523, 530 (C. Hyneman and D. Lutz, eds., Liberty Press, Indianapolis: 1983).

[13] *See, e.g.*, Section 12, Constitution of Virginia (1776), reprinted in *Sources* at 312.

[14] *See, e.g.*, Articles XVI and XXI, Constitution of Massachusetts (1780), reprinted in *Sources* at 376,77.

[15] *See, e.g.*, Section XII of the 1776 Constitution of Pennsylvania, reprinted in *Sources* at 330.

press, free speech was subsumed under the freedom of the press, not the other way around.

Indeed, James Madison and other opponents of the Sedition Act of 1798 enlisted the freedom of the press to ban seditious libel prosecutions. *See, e.g.*, J. Madison, *Report on the Virginia Resolutions*, reprinted in 5 *The Founders' Constitution* 141, 142 (P. Kurland and R. Lerner, eds., Univ. Chicago: 1987). It was not until the 20th century that the ban on seditious libel was linked to the freedom of speech. *See* Abrams v. United States, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting). Not until 45 years later did this Court rule that seditious libel laws violated "freedom of expression," and even then it expressly approved of Madison's claim that such laws violated the freedom of the press. *Compare* New York Times v. Sullivan, 376 U.S. at 269-72 *with id.* at 273-77. To rule, as the court below ruled, that the Press Clause has somehow been absorbed by the Speech Clause is, therefore, neither historically nor textually sound.

Nor is the view of the court below sound as a matter of constitutional policy. Although the licensing system banned by the freedom of the press extended to all publications, no matter what the subject, the central design was to prevent the publication and dissemination of information "raising a disaffection to His most Excellent Majesty and His Government,"[16] to the end of protecting the reputation of the current regime. T. Cooley, A Treatise on Constitutional Limitations 516 (5th ed. Little, Brown, Boston: 1883); *Sources* at 242-43. Not surprisingly, the leaders of the American independence movement realized the importance of the

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[16] "An Act for Preventing the Frequent Abuses in Printing Seditious Treasonable and Unlicensed Books and Pamphlets and for Regulating Printing and Printing Presses," reprinted in 5 *Founders' Const.* 112.

freedom of the press in ridding the colonies of the hated English licensing system. Thus, in the Continental Congress' 1774 appeal to the inhabitants of Quebec for support of the war for independence, they stressed the "importance" of the freedom of the press for "its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honourable and just modes of conducting affairs." I *Journals of the Continental Congress,* reprinted in I *American Founding Era* 233-34. Indeed, nine years earlier, John Adams, writing against the Stamp Act, likewise praised the freedom of the press as essential to save the people from "tyrants," warning especially against those in government who attempt to "wheedle[] [you] out of your liberty by ... pretences of politeness, delicacy or decency." J. Adams, "A Dissertation on the Canon and Feudal Law," reprinted in J. Adams' *Revolutionary Writings* 28, 29.

Even after a more representative form of government was established in America, James Madison invoked the freedom of the press against the Sedition Act of 1798, which he maintained was designed to "repress[] information and communication among the people" in relation to congressional and presidential elections:

> Let it be recollected ... that the right of electing members of the Government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust and on the **equal freedom,** consequently, of examining and discussing these merits and demerits of the candidates... [J. Madison, Report

> on Va. Resolutions, reprinted in 5 *Founders' Const.* 145, emphasis added.]

St. George Tucker echoed Madison's view, advising elected officials that, if they cannot stand the criticism that comes with elective office, they ought to retire, not impair "the absolute freedom of inquiry." Otherwise, the American government will be "instantly changed from a federal union of representative democracies, in which the people of the several states are sovereign ... to a consolidated oligarchy..., according to the prevailing caprice of the constituted authorities or of those who may usurp them." St. G. Tucker, "Of the Right of Conscience; and of the Freedom of Speech and of the Press," reprinted in St. G. Tucker, *Views of the Constitution of the United States with Selected Writings*, 371, 381 (Liberty Fund, Indianapolis: 1999). To prevent such a transformation, Tucker maintained, "the absolute freedom of the press" had been especially designed, being far more effectual to this task than the freedom of speech. *Id.* at 382.

This historic link between the freedom of the press and free elections has not been lost on this Court. In Mills v. Alabama, 384 U.S. 214 (1966), this Court struck down an Alabama corrupt practices law prohibiting the solicitation of a vote for or against a proposition on election day on the sole ground that it violated the freedom of the press, and without subjecting the law to strict or any other kind of scrutiny. *Id.* at 218-20. The Court affirmed that the absolute freedom of the press was essential to "the free discussion of governmental affairs [which] of course includes discussion of candidates" (*id.* at 218):

> Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies

> the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free. [*Id.* at 219.]

It is the freedom of the press, then, not free speech and association, that America's founders declared to be "one of the great bulwarks [against] despotic governments." *See* Section 12, Virginia Constitution (1776), reprinted in *Sources* 312. Indeed, it was the "absolute" freedom of the press — unconstrained by government licensing, previous restraints, editorial control, forced disclosures, and discriminatory economic burdens, not contained by licensing, limitations, controls, disclosures, and burdens such as are imposed by BCRA/FECA — that was deliberately designed by America's founders to protect the people from government corruption.

III. BCRA TITLE II VIOLATES THE PAUL PLAINTIFFS' FREEDOM OF THE PRESS.

Coining a new term, "electioneering communications," Congress has, by BCRA Title II, extended the reach of FECA beyond communications that meet the formulaic test of "express advocacy" as defined in Buckley v. Valeo, 424 U.S. at 44, n.52. Claiming that federal candidates and their supporters were "evading" the law by "sham issue" advertising on radio and television, Congress enacted Title II, to place under FEC control "any broadcast, cable, or satellite communication which ... **refers** to a clearly identified candidate for Federal office," and which is broadcast within a specified period leading up to an election, or in the alternative — should this Court find the regulation unconstitutional — any such communication "which **promotes** or **supports** a candidate for [Federal] office, or **attacks or opposes** [such] a candidate." New FECA § 304(f)(3)(A)(i) and (ii), Jur. St. App. at 38a-39a (emphasis added). In a split decision, the court below found the primary

definition of electioneering communication unconstitutional, but the "backup" definition constitutional. Supp. App. at 12sa (*Per curiam* op.). Had the court below applied the freedom of the press standard of review, it should have found the entire BCRA Title II regulatory scheme unconstitutional.

A. Title II Is an Unconstitutional Licensing System.

BCRA § 203(a) (Jur. St. App. at 42a-44a) purports to impose a broad and absolute ban on all corporate and labor union disbursements for "electioneering communications." In fact, it does not. Rather, by its definitions of "electioneering communications" including its statutory and regulatory exemptions thereto, Title II functions as a comprehensive licensing system permitting some corporate and labor union expenditures of funds that influence federal elections, while denying that same privilege to others, including plaintiffs Citizens United, Gun Owners of America, Inc., and RealCampaignReform.org.

As Judge Henderson pointed out in dissent below, BCRA Title II does not ban all communications that refer to a federal candidate within the statutory specified periods, nor all communications that either promote or support the election or defeat of a federal candidate. Supp. App. at 364sa. Indeed, as the FEC has expressly provided, Title II does not apply to "a newspaper or magazine, handbill, brochure, bumper sticker, yard sign, poster, billboard, and other written materials, including mailings; communications over the Internet, including electronic mail; or telephone communications." 11 C.F.R. § 100.29(c)(1). Second, as Judge Henderson also observed, Title II does not even apply to all such communications that are broadcast by radio and television. Supp. App. at 365sa-66sa.

Third, Title II does not apply to "a candidate debate or forum" approved by the FEC or "to any other communication exempted under such regulations as the [FEC] may promulgate" so long as such exemption is consistent with Title II. New FECA § 304(f)(3)(B)(iii) and (iv), Jur. St. App. at 40a. Fourth, according to the court below, some nonprofit and political advocacy corporations are exempted from Title II's ban on electioneering communications under FEC v. Massachusetts Citizens for Life (MCFL), 479 U.S. 238 (1986). *See* Supp. App. at 13sa, 368sa-70sa, and 1166sa-69sa (Leon Op.). Accordingly, the FEC has extended its regulations governing the MCFL exception to electioneering communications, by which the FEC exercises enormous discretionary power over whether a nonprofit corporation qualifies. 11 C.F.R. § 114.10.

By absolutely exempting some publications (11 C.F.R. § 100.29(c)(1) and (2)), qualifiedly excepting others (11 C.F.R. §§ 100.29(c), 114.10), and permitting still others so long as they meet the registration and reporting requirements of FECA/BCRA (11 C.F.R. § 104.20), Title II "strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." Lovell, 303 U.S. at 451. By conferring special privileges upon some to publish and disseminate their ideas in ways not permitted to others,[17] Title II engages in the kind of discrimination that is "reminiscent of the abhorred licensing system of Tudor and Stuart England — a system the [freedom of the press] was intended to ban from

[17] For example, any incorporated television or radio broadcasting outlet may publish without restriction a news story, editorial or commentary containing an electioneering communication, but plaintiffs Citizens United, Gun Owners of America, Inc., and RealCampaignReform.org may not broadcast any electioneering communication unless they fit within the MCFL exception set forth in 11 C.F.R.§ 114.10.

this country." Bellotti, 435 U.S. at 801 (Burger, C.J., concurring).

B. Title II Is an Unconstitutional Prior Restraint.

Title II imposes a prior restraint not only upon those corporations and labor unions banned by § 203(a) (Jur. St. App. at 42a) from expending money for "electioneering communications," but upon those like the plaintiffs Gun Owners of America Political Victory Fund ("GOAPVF") and Citizens United Political Victory Fund ("CUPVF") who are permitted by Title II to engage in electioneering communications, but are not exempted from the onerous reporting, disclosure, and financial burdens imposed upon them as political committees. *See* new FECA § 304(f)(1) and (2), Jur. St. App. at 37a-38a.

There is no question that the ban on plaintiffs Gun Owners of America, Inc., Citizens United, and RealCampaignReform.org operates as a prior restraint. Not only does the statute, on its face, prohibit such organizations from making any expenditures towards certain press activities, which are now defined as electioneering communications, but, by 11 C.F.R. § 114.10(a) and (e), the FEC requires such organizations to "demonstrat[e] qualified nonprofit corporation status" under MCFL by certification to the FEC. And the FEC is empowered to seek a court injunction against them should they fail to meet the certification requirement, or otherwise to evade the ban on electioneering communications. *See* 2 U.S.C. § 437g(a)(6)(A).[18] Such an injunctive action would also be

[18] Such restraints cannot be characterized as "time, place and manner" restrictions, as the *per curiam* opinion below maintained. Supp. App. at 107sa, n.69. The ban on electioneering communications by corporate entities, coupled with the administrative regulations requiring certification

available to the FEC to enforce the reporting requirements of Title II, as applied to GOAPVF and CUPVF should either disburse funds "for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year." New FECA § 304(f)(1), Jur. St. App. at 37a. Indeed, such reports are due within 24 hours after the first and each subsequent aggregation of any excess over $10,000 during each calendar year. *See* Supp. App. at 66sa. While such reports need not be made "until after the advertisements have been publicly distributed" (*id.* at 108sa), there is no question that they are a significant factor in the making of any decision to "produce," much less "air," an electioneering communication as defined by Title II. As Judge Henderson observed in her dissent on this point, the reporting and disclosure requirements laid down in Title II are "intrusive," "inhibiting," and "cumbersome." *Id.* at 372sa-73sa, 375sa.

As prior restraints, BCRA § 201's reporting and disclosure requirements (Jur. St. App. at 37a-38a) must be justified, if at all, by the kind of imminent and serious danger to the survival of the nation as was required in the publication of the Pentagon Papers. *See* New York Times v. United States, 403 U.S. at 714, 718, 725-27, 730. The government has made no such showing here, nor has it even attempted such a showing. *See* Supp. App. at 112sa-13sa, 823sa-30sa, 835sa-40sa.

C. Title II Unconstitutionally Establishes Government Editorial Control.

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meeting the MCFL exception, are designed "to prevent the dissemination of ideas or opinions thought dangerous or offensive" and, therefore, are well within the definition of "prior restraint." *See* Blue Canary Corp. v. City of Milwaukee, 251 F.3d 1121, 1123 (7th Cir. 2001).

In the political marketplace, the First Amendment, particularly the freedom of the press, demands a wide berth for speakers and their audience, writers and their readers. Not only must governments refrain from paternalistic suppression of truthful information, but they also cannot suppress ideas on the ground that they may be misleading, or even "false." *See* New York Times v. Sullivan, 376 U.S. at 271-73. Otherwise, the government would intrude upon the constitutional right of private editorial control of both the publisher and his reader, the speaker and his listener. *See* Martin v. City of Struthers, 319 U.S. 141, 141-44, 147-49 (1943). Thus, governments may not generally force a speaker or writer to disclose his or her identity as a deterrent against the dissemination of misleading, false, or even fraudulent ideas. *See, e.g.*, McIntyre v. Ohio Elections Comm., 514 U.S. 334, 349-53 (1995).

The court below, however, assumed the opposite. The *per curiam* opinion chided some plaintiffs for having run television and radio issue ads "while hiding under dubious and misleading names," claiming that the First Amendment's commitment to "uninhibited, robust, and wide-open" debate justified — indeed, compelled — government-enforced disclosure of speaker and publisher identities, lest such "organizations hide themselves from the scrutiny of the voting public." Supp. App. at 106sa. Such a paternalistic view of the role of government in the marketplace of political ideas, as Judge Henderson amply demonstrated, is totally foreign to the First Amendment. *Id.* at 346sa-47sa, 378sa-80sa. Indeed, forcing the disclosure of the names of the major publishers (the $1,000 contributors) and publishers is a direct abridgment of the editorial discretion guaranteed to the people by the freedom of the press. *See* McIntyre, 514 U.S. at 348.

But the forced disclosure of publisher identities is not the only unconstitutional intrusion that BCRA Title II makes upon

the people's editorial prerogatives. By imposing its view on whether a political ad that "refers" to a clearly identified candidate for Federal office, or one that "supports" or "promotes" the election of a candidate or "attacks" or "opposes" such a candidate, is a "sham issue" ad, the government has robbed both the producer of the ad, and the viewer thereof, of their editorial powers secured by the freedom of the press. *See* Martin, 319 U.S. at 143-44. The freedom of the press secures to the people the right to make such editorial judgments for themselves. *See* Miami Herald, 418 U.S. at 247-54, 256, 258.

Additionally, Congress has conferred upon the FEC significant editorial judgment, through the issuance of advisory opinions, to determine whether an "issue ad" is a regulated "electioneering communication." According to Judge Leon, such editorial discretion "saves" the back-up definition from a constitutional challenge of vagueness. *See* Supp. App. at 1166sa. Judge Leon has overlooked, however, that the grant of such power is the very essence of censorship, wresting from the people the right to draw the line between "candidacy advocacy" and genuine issue advocacy. *See id.* at 1138sa-39sa.[19] The

[19] The exercise of such editorial discretion by means of advisory opinions, under the threat of civil penalties and injunctive relief, would be even more pronounced under Title II's primary definition of "electioneering communications." As Judge Henderson observed, the statutory definition which turns on whether a communication "refers to a clearly identified candidate for Federal office" is open-ended. Supp. App. at 358sa-59sa. She is right. The FEC has already exercised its editorial powers, promulgating a regulation containing examples of what meets the statutory definition, which, unsurprisingly, is open-ended. *See* 11 C.F.R. § 100.29(b)(2). Under the Buckley regime, this Court put a tight rein on the FEC, requiring the "magic words" of express candidate advocacy. Under the new BCRA regime, the FEC is loosed as editor-at-large of political advertising related to federal election campaigns.

exercise of such editorial control is *per se* an unconstitutional abridgment of the freedom of the press. *See* Miami Herald, 418 U.S. at 258.

D. Title II Imposes Discriminatory Economic Burdens.

There is no question that Title II discriminates. The statute expressly exempts altogether "a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate." New FECA § 304(f)(3)(B)(i), Jur. St. App. at 39a. Thus, media corporations that own television and radio stations "need not make separably identifiable expenditures to communicate their views" on the issues; rather, "[t]hey accomplish the same objective each day within the framework of their usual protected communications." *See* Bellotti, 435 U.S. at 783, n.17. As Judge Henderson observed, BCRA exempts a "class of privileged speakers" from having to comply with the reporting and disclosure requirements of Title II. Supp. App. at 365sa-366sa.

Such discriminatory treatment is an unconstitutional violation of the Paul Plaintiffs' freedom of the press. The increased costs of compliance with the reporting and disclosure requirements of Title II are obvious. *See* MCFL, 479 U.S. at 254-55. Such costs operate like a "tax on knowledge," imposing economic burdens that adversely impact the quality and quantity of communications on the issues related to campaigns for election to federal office. *See* Cloud Decl. ¶¶ 7, 10, 14, App. 83a-85a, 89a. *See also* Willis Rep. ¶¶ 13c, 14, App. 60a-62a; Miller Rep. at 22-24, App. 33a-36a; Olson Rep. ¶ 116, App. 68a. By imposing these costs on some, and not on others, BCRA Title II crosses a fixed line of unconstitutionality. *See* Grosjean, 297 U.S. at 251.

IV. BCRA TITLE I, CREATING NEW FECA § 323(e) AND § 323(f) RESTRICTIONS, VIOLATES THE FREEDOM OF THE PRESS.

A. New FECA § 323(e) Imposes Unconstitutional Editorial Controls.

New FECA § 323(e) (Jur. St. App. 30a-32a.) singles out for special limitations the political activities of somewhat more than 1,100 Americans each biennium — federal office holders and their challengers — whether they act directly or through agents and organizations. Under BCRA, Congressman Paul, a federal office holder, could be sentenced for up to five years in federal prison if he were to knowingly and wilfully sign a letter for Gun Owners of America, Inc. soliciting funds to pay for radio ads criticizing identified Congressmen who voted against a bill sponsored by Congressman Paul.[20] Congressman Paul testified that such limits adversely impact his "ability as a federal office holder and candidate for election to federal office to help raise money for organizations that promote [his] positions on policy issues." Paul Decl. ¶ 16, App. 75a. If Congressman Paul is so restricted, then he is obviously handicapped in his ability to legislate. Also harmed is Gun Owners of America, Inc., which has used congressional signers for solicitation letters in the past, intends to do so in the future,

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[20] How these rules actually operate could not be more confusing. The statute clearly permits some solicitations to be made for I.R.C. § 501(c) organizations, subject only to the requirement that the "solicitation does not specify how the funds will or should be spent." Section 323(e)(4), Jur. St. App. 32a. However, the FEC implemented rules that allow solicitations that are "not to obtain funds for activities in connection with an election," which could be read to require that the solicited funds not be used for activities in connection with an election rather than the statutory requirement that the solicitation not make reference to such an intended use. 11 C.F.R. § 300.65(a)(2).

and uses the funds for "issue advocacy" which BCRA classifies as "federal election activity." Pratt Decl. ¶ 10, Rec. No. 60. *See also* Bossie Decl. ¶ 9, Rec. No. 60, as to the activities of Citizens United, and Babka Decl. ¶¶ 7-9, Rec. No. 60, as to the activities of RealCampaignReform.org.

These restrictions are not limited to uses of funds which affect only federal elections, but rather extend to "any election." Section 323(e)(1)(B), Jur. St. App. at 31a. If BCRA had been in effect in 2002, Michael Cloud, the Libertarian candidate for U.S. Senate from Massachusetts, could have been fined up to $50,000 for a knowing and wilful solicitation of contributions to the campaign committees of his Libertarian colleagues who were candidates for statewide office in Virginia, where unlimited individual contributions are lawful for state races. Virginia State Board of Elections, *Campaign Finance in Virginia* (rev. July 2003), 18.

In an opinion by Judge Henderson, the court below dismissed the claims of the Paul Plaintiffs on the ground that such restrictions on federal officeholders "do ... not exert 'editorial control' on anyone's press activities." Supp. App. at 460sa, n.175. This is not correct. Although Judge Henderson has conceded that "solicitation" of funds to support the dissemination of ideas is constitutionally protected (Supp. App. at 459sa), she has failed to recognize that a "cap" on such solicitation, however "moderate," impairs the editorial function that the freedom of the press confers upon federal office holders and candidates. *See* Miami Herald, 418 U.S. at 254-58. Furthermore, she ignored § 323(e)(1)'s limit on "spend[ing] funds," notwithstanding this Court's affirmation in New York Times v. Sullivan that such expenditures are crucial to the free press guarantee of "'the widest possible dissemination of information from diverse and antagonistic sources.'" New York Times, 376 U.S. at 266.

It is difficult even to understand the Congressional purpose of such a limitation. According to Judge Henderson, "a federal candidate's solicitation of large donations from wealthy individuals, corporations, and labor organizations — whether or not the funds are used 'for the purpose of influencing' a federal election — can raise an appearance of corruption of the candidate." Judge Henderson relied on the defense testimony of two corporate CEO's who resent being asked for contributions, two senators who resent asking, and a witness who testified that the public perceived candidate fundraising to be corrupt. Supp. App. at 456sa-57sa. If testimony such as this is the basis for § 323(e), it undermines the very purpose of the freedom of the press. The free press guarantee posits editorial control and accountability in the people, not in the government. *See* Miami Herald, 418 U.S. at 254-58. Just because the senators and businessmen would rather that the government make their editorial decisions for them does not mean that they can enlist Congress to deny that press right to others.[21] To the contrary, the freedom of the press was designed to ban such paternalistic legislation to ensure that the people remained the censors of the government, not the other way around. *See* Arg. II, *supra*, at 30-32.

Actually, § 323(e) operates to protect incumbents by placing a discriminatory economic burden upon their challengers. By

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[21] Indeed, the exclusive focus of § 323(e) appears to have been incumbents, not their challengers, yet the prohibitions apply equally to both. Never discussed in the legislative history, the record below, or any of the court opinions was how the BCRA ban on fundraising by challengers — who have neither power to pressure potential donors nor valuable access to buy — could be justified. Senator McCain's justification that this provision prevents "Federal officeholders from using their offices or positions of power to solicit money" as being analogous to "federal laws and ethical rules" simply does not apply to challengers. Statement of Sen. McCain, 148 Cong. Rec. S2138 (Mar. 20, 2002).

denying to challengers the freedom to solicit, it will make it more difficult for interest groups, such as Gun Owners of America, Inc. and Citizens United, to raise funds necessary to attack incumbents for how they have voted, and will encumber greatly minor party federal candidates like Michael Cloud to pool their resources with candidates of that same party seeking election to state office.

B. New FECA § 323(f) Imposes Unconstitutional Editorial Controls.

New FECA § 323(f) (Jur. St. App. at 32a) precludes state and local officeholders, or candidates therefor, from spending any funds except FECA/BCRA-regulated "funds" for a "public communication that refers to a clearly identified candidate for Federal office ... and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)." Jur. St. App. at 32a-33a. According to 11 C.F.R. § 100.26, a "public communication," means "a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising [but not] communications over the Internet."[22]

According to Judges Kollar-Kotelly and Leon, § 323(f)'s restrictions on state and local officeholders and candidates are permissible as limits on "the use of soft money ... for the purpose of directly influencing a federal election." Supp. App.

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[22] The legislative record is devoid of any debate on this provision, except for a brief reference in the section-by-section analysis of BCRA entered into the Congressional Record by Sen. Feingold, 148 Cong. Rec. S1992 (Mar. 18, 2002).

1146sa, 993sa. If § 323(f) had been in effect for the last election cycle, plaintiff Carla Howell, the 2002 Libertarian candidate for Governor of Massachusetts, would likely have been financially precluded from promoting plaintiff Michael Cloud, the 2002 Libertarian candidate for U.S. Senate from Massachusetts, in her campaign literature or her media advertisements, or cooperative mailings supporting their joint candidacies. Cloud Decl. ¶ 20, App. 90a-91a; Howell Decl. ¶ 7, App. 97a-98a; Paul Decl. ¶ 16, App. 75a. Further, Ms. Howell could not reasonably have afforded to air an endorsement of her candidacy by a member of Congress (who was a candidate for federal office) with a supportive reference to any such congressman, even one from another state, even though his constituents would never see the communication. Amazingly, in a Presidential election year, Ms. Howell, for example, could not, for lack of funding necessary to comply with § 323(f) attack a President running for reelection as a big spender of the type that she would not be if elected.

A more comprehensive effort by Congress to ensconce the FEC as editor-in-chief of American election campaigns is difficult to imagine. By placing upon state and local officeholders and state and local candidates the onerous FECA contribution limits and reporting burdens, Congress has imposed an unconstitutional penalty upon such officeholders and candidates in their exercise of editorial discretion. *See* Miami Herald, 418 U.S. at 254-58. This burden falls especially hard upon minor party candidates, such as Mr. Cloud and Ms. Howell, because the pooling of scarce resources is essential if minor party state, local, and federal candidates are to get their message to the electorate. *See* Cloud Decl. ¶ 20, App. 90a.

V. THE FECA/BCRA CONTRIBUTION LIMITS AND DISCLOSURE REQUIREMENTS ARE UNCONSTITUTIONAL.

A. The Paul Plaintiffs Have Standing to Challenge the Constitutionality of BCRA § 307.

The district court held that the Paul Plaintiffs lacked standing to challenge the constitutionality of BCRA § 307. Supp. App. at 8sa. Judge Henderson opined that "no person who challenges either set of provisions" in BCRA increasing the FECA contribution limits "has standing to do so" (*id.* at 472sa), and specifically, that the "Paul plaintiffs lack standing to challenge BCRA's failure to index certain contribution limits for inflation," because the Paul Plaintiffs' evidence constituted "mere allegations." *Id.* at 475sa. This ruling is erroneous.

First, it mistakenly assumes that the Paul Plaintiffs' complaint was limited to the failure of BCRA to raise and index the contribution limits for PACs. 2 U.S.C. § 441a(a)(1)(C), Jur. St. App. at 19a. The Paul Plaintiffs' constitutional attack upon BCRA § 307 also contained the claim that the administration of the BCRA-amended FECA individual contribution limits violates the freedom of the press rights of candidates Ron Paul, Michael Cloud, and Carla Howell. *See* Paul Plaintiffs' Amended Complaint ¶¶ 11(b), 13(a)-(b), 16(a)-(b), 41, 43, 44, 53, and 57, App. 1a-4a, 6a. *See also* Paul Plaintiffs' Initial Brief at 27-30, Rec. No. 65; Opposition Brief at 15, Rec. No. 74; and Reply Brief at 7-10.

Second, the court below disregarded the more than ample evidence proffered by the Paul Plaintiffs in support of their claims. Addressing first their challenge to the contribution limits with respect to political committees, there is concrete evidence of injury in fact in the record. Both CUPVF's Michael Boos and GOAPVF's Lawrence Pratt represented that their respective political committees were injured by virtue of the FECA/BCRA $5,000 per-election maximum contribution the committees were permitted to make to federal candidates

and committees. 2 U.S.C. § 441a(a)(2)(A), Jur. St. App. at 19a. Pratt Decl. ¶¶ 18-19, App. 105a-06a, Boos Decl. ¶¶ 13-14, App. 107a-08a. Those unrebutted declarations were supported by testimony that their respective committees likely would receive more contributions if the contribution limit had been raised/indexed for inflation, or simply did not exist at all. *See* Pratt Decl. ¶¶ 12, 18, App. 105a; Pratt Dep. at 22-25; Boos Decl. ¶ 14; Boos Dep. at 32-33, Rec. No. 60. The plaintiff committees' FEC reports, demonstrating a history of maximum contributions under FECA in certain years, supported the testimony that higher contributions would have been made if allowed. Pratt Decl. ¶¶ 18-19, App. 105a-06a, and Exhibit A (Rec. No. 60); Boos Decl. ¶¶ 13-14, App. 107a-08a, and Exhibit B (Rec. No. 60). These ongoing, active multicandidate political committees clearly were impacted adversely by FECA, which limited contributions to such PACs per calendar year, as well as by such PACs per candidate, per election, to $5,000, and by BCRA, which failed to raise such contribution limits or to index such contributions for inflation. Such fact-based testimony is clearly sufficient to meet the "injury in fact" requirement for standing. *See* Lujan v. National Wildlife Federation, 504 U.S. 555, 561-62 (1992).

As for the impact of BCRA § 307 upon the Paul Plaintiff candidates and their committees, Congressman Paul and Mr. Cloud both testified that their press activities were impaired by the BCRA/FECA individual and PAC contribution limits. *See* Paul Plaintiffs' Proposed Findings of Fact ¶¶ 12-13, 19-20, 37-39, 41-42 and 48-49, App. 109a-110a, and 113a-120a; Paul Decl. ¶¶ 12-16, App. 72a-75a; Lizardo Decl. ¶¶ 3-5, App. 77a-78a; Anonymous Witness No. 1 Decl. ¶¶ 3-5, App. 79a-80a; Cloud Decl. ¶¶ 13-15, App. 87a-89a. Without question, such evidence that the individual contribution limits adversely impact on the quantity and quality of their campaign communication meets the Lujan standing test.

In sum, the Paul Plaintiffs submitted unrebutted testimony that establishes, concretely and with particularity, the invasion of a legally protected interest, which is actual (under FECA) and imminent (under BCRA), there being no doubt about either a causal connection between those injuries and the limitations imposed by the statutes complained of or the fact that future injury will be redressed by a favorable decision.

B. The BCRA/FECA Contribution Limits and Disclosure Requirements Unconstitutionally Abridge the Paul Plaintiffs' Rights under the Freedom of the Press.

Heretofore, limits upon individual contributions have been sustained upon the factual assumption that "contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties." Buckley, 424 U.S. at 29. Thus, constitutional orthodoxy holds that limits on contributions, constituting only a "marginal restriction ... upon free communication," are constitutional and to be measured solely by the First Amendment guarantees of free speech and free association. Buckley, 424 at 20-22. The evidence adduced by the Paul Plaintiffs, however, shatters both the factual and legal assumptions in Buckley, particularly when contribution limits are measured by the freedom of the press.

Unrebutted testimony has established that Congressman Paul has labored through several campaigns hampered by limits on individuals who desire to contribute beyond the maximum, cutting into the quantity and quality of his efforts to reach the public to support his candidacy and his position on the issues. Paul Decl. ¶¶ 14-15, App. 73a-74a; Elam Decl. ¶ 5, Rec. No.

60. In like manner, plaintiffs Cloud and Howell have been hampered in their recent campaigns for federal office. Cloud Decl. ¶ 15, App. 89a; Howell Decl. ¶ 15, App. 101a. In each of his races, plaintiff Paul has faced opposition from the "institutional press" in the major markets of his congressional district (Paul Decl. ¶ 13, App. 72a-73a) and plaintiffs Cloud and Howell have been virtually ignored by the press. Cloud Decl. ¶¶ 25-28, App. 92a-94a; Howell Decl. ¶ 8, App. 98a. *See also* Willis Rep. ¶ 5, App. 46a-48a. Under FECA the Paul Plaintiffs have been, and continue to be, subject to the contribution limits imposed by 2 U.S.C. § 441a(a). Yet, the institutional press is exempted from the BCRA/FECA contribution limits for expenditures for news stories, commentaries, and editorials attacking candidates, or supporting the opposition. 2 U.S.C. § 431(9)(B)(i). *See* Bellotti, 435 U.S. at 781, n.17.

Such disparate treatment of the "institutional press" and the Paul, Cloud, and Howell candidacies has resulted directly from the press exemption enjoyed by the former, first established by FECA (2 U.S.C. § 431(9)(B)(i)), and extended by BCRA Title II (new FECA § 304(f)(3)(B)(i), Jur. St. App. at 39a). By imposing economic burdens upon the Paul Plaintiffs, but not upon the institutional media, BCRA/FECA violates the freedom of the press which commands equal treatment of all forms of communicative activity:

> Freedom of the press is a "fundamental personal right" which "is not confined to newspapers and periodicals.... The press in its historic connotation comprehends **every sort of publication which affords a vehicle of information and opinion."** [Branzburg v. Hayes, 408 U.S. 665, 704 (1972), quoting Lovell v. Griffin (emphasis added).]

Additionally, the enforcement mechanism employed by FECA/BCRA to assure compliance with individual contribution limits intrude upon the editorial function of candidates and their campaign committees, requiring disclosure of the identities of their major "publishers," *i.e.*, their individual contributors of more than $200. *See* 2 U.S.C. §§ 434(b)(3), 431(13). Over 50 percent of Americans believe that politicians want disclosure requirements so they can see who is giving money to their challengers. By a two-to-one margin, Americans believe that incumbents use agencies to harass the supporters of challengers. J. Miller, *Monopoly Politics* 104-05.[23] As noted in Part II above, the protective shield of anonymity provided by the First Amendment is not limited to freedom of association. Indeed, since Buckley, this Court has applied the anonymity principle where the claim of "privacy" was clearly attenuated, demonstrating that forced disclosure of the identities of publishers, editors, and disseminators is based upon the freedom of the press, not just free association. *See, e.g.*, McIntyre, 514 U.S. at 341-44; Watchtower, 536 U.S. at 166-68.

In Watchtower, this Court noted that Talley and McIntyre stand for the proposition that the principle of anonymity applies to "persons who **support** causes," as well as to persons who engage in the actual communicative activity promoting such causes. Watchtower, 536 U.S. at 166 (emphasis added). Indeed, those who contribute money to enable the writers and

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[23] Moreover, incumbents have an advantage in fundraising because they are in a position to intimidate prospective donors once their identities are disclosed. They "often remind major contributors that even if they lose, they will be around long enough to help them or hurt them." J. Miller, *Monopoly Politics* 79-80. As a result, some groups have a blanket policy of never contributing to non-incumbents in primaries and some PACs feel compelled to give money to candidates who hold views in direct opposition to their founding principles. *Id.*

editors, the circulators and the speakers are their "publishers." All alike are equally protected by the freedom of the press from forced disclosure of their identities. *See* McIntyre, 514 U.S. at 360-67 (Thomas, J., concurring). To allow the government, in the name of "corruption and the appearance of corruption," to sacrifice this time-honored principle of anonymity is to disregard the central purpose of the freedom of the press, as articulated by Sir William Blackstone: "Every freeman has an undoubted right to lay **what sentiments he [not the government] pleases before the public**: to forbid this, is to **destroy** the freedom of the press." IV W. Blackstone's *Commentaries* 151-52 (emphasis added).

CONCLUSION

For the reasons stated, the judgment of the district court should be reversed, Buckley v. Valeo should be either overturned or set aside, freedom of the press be established as the governing constitutional principle for evaluation of campaign finance legislation, and the challenged sections of BCRA/FECA should be stricken.

Respectfully submitted,

HERBERT W. TITUS
TROY A. TITUS, P.C.
5221 Indian River Road
Virginia Beach, VA 23464
(757) 467-0616

WILLIAM J. OLSON*
JOHN S. MILES
WILLIAM J. OLSON, P.C.
Suite 1070
8180 Greensboro Drive
McLean, VA 22102
(703) 356-5070

RICHARD WOLF
MOORE & LEE, LLP
1750 Tysons Boulevard
Suite 1450
McLean, VA 22102
(703) 506-2050

GARY G. KREEP
U.S.JUSTICE FOUNDATION
Suite 1-C
2091 E. Valley Parkway
Escondido, CA 92027
(760) 741-8086

PERRY B. THOMPSON
629 High Knob Road
Front Royal, VA 22630
(540) 305-0012

Attorneys for Appellants
**Counsel of Record*
July 8, 2003

APPENDIX

CONGRESSMAN RON PAUL, *ET AL.*, v. FEDERAL ELECTION COMMISSION, *ET AL.*, NO. 02-CV-781

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Ron Paul, Gun Owners of America, Inc., Gun Owners of America Political Victory Fund, RealCampaignReform.org, Citizens United, Citizens United Political Victory Fund, Michael Cloud, and Carla Howell bring this action against the defendants for declaratory and injunctive relief, alleging as follows:

NATURE OF THIS ACTION

1. This is an action for declaratory and injunctive relief with respect to certain provisions of the Bipartisan Campaign Reform Act of 2002, P. L. No. 107-155, as it amends the Federal Election Campaign Act, 2 U.S.C. Sections 431, *et seq.* ("BCRA/FECA"), as well as certain related provisions of the FECA, and against their enforcement by the Defendants on the grounds that these integrally related provisions deprive the Plaintiffs of the Freedom of the Press in violation of the First Amendment of the Constitution of the United States.

* * *

Plaintiffs' Activities in the Marketplace of Ideas Related to Federal Election Campaigns

41. As a past, current, and future candidate for election to federal office, Plaintiff Ron Paul has been, is currently, and will continue to be, injured by the afore-stated system of prior restraints and discriminatory regulations contained in FECA including: (a) registration with, periodic

reports to, and disclosures of the names, addresses and occupations of certain contributors to, the FEC; and (b) compliance with the contribution limits imposed upon individuals and other entities, even as raised and indexed by BCRA, and with the congressional mandate concerning coordinated expenditures, as provided for in the BCRA. Such prior restraints and regulations currently impose, and will continue to impose, discriminatory economic burdens and penalties upon Plaintiff Paul's communicative activity expressly advocating his election to federal office and promoting the policy positions that he takes as such a candidate, thereby preventing Plaintiff Paul, by threat of injunctive, and other restraining action, and by threat of civil and criminal penalties, as enhanced by BCRA, from engaging in the quality and quantity of political communications that he would choose in his editorial discretion, but for the licensing power, editorial control and discriminatory economic burdens and penalties placed upon him by the BCRA/FECA. Additionally, as a United States citizen, voter in and donor to federal election campaigns, and as to electioneering communications in relation to such campaigns, Plaintiff Paul is being discriminated against by licensing requirements, editorial controls and economic burdens and penalties not imposed upon broadcasting facilities, newspapers, magazines and other periodical publications not owned or controlled by any political party, political committee or candidate, and which are not subject to the power of the FEC to threaten injunctive, and other restraining, action and civil and criminal penalties.

42. Plaintiffs Gun Owners, RealReform, and Citizens United will be injured by the afore-stated system of prior restraints and discriminatory regulations under the BCRA/FECA. * * * Specifically, as to "electioneering communications," Plaintiffs Gun Owners, RealReform, and Citizens United will be discriminated against by licensing requirements, editorial controls, and economic burdens not

imposed upon broadcasting facilities, newspapers, magazines and other periodical publications not owned or controlled by any political party, political committee or candidate, and which are not subject to the power of the FEC to threaten injunctive, or other restraining, action and civil and criminal penalties.

43. Plaintiffs GOA-PVF and CUPVF have been, currently are, and will continue to be, injured by the afore-stated system of prior restraints and discriminatory regulations under the BCRA/FECA, including: (a) registration with, reporting to and disclosure of the names, addresses and occupations of certain contributors, to the FEC; and (b) compliance with contribution limits imposed upon political committees independent of a candidate and a political party, having been neither raised nor indexed by BCRA. Such prior restraints and regulations currently impose, and will continue to impose, discriminatory economic burdens and penalties upon Plaintiffs GOA-PVF's and CUPVF's communicative activity expressly advocating or opposing the election of candidates to federal office.... * * *

44. As past, present and likely future candidates for federal office, Plaintiffs Michael Cloud and Carla Howell have been, currently are, and will continue to be, injured by the afore-stated system of prior restraints and discriminatory regulations contained in FECA including: (a) registration with, periodic reports to, and disclosures of the names, addresses and occupations of certain contributors to, the FEC; and (b) compliance with the contribution limits imposed upon individuals and other entities, even as raised and indexed by BCRA, and with the congressional mandate concerning coordinated expenditures, as provided for in the BCRA. Such prior restraints and regulations currently impose, and will continue to impose, discriminatory economic burdens and penalties upon Plaintiffs Cloud's and Howell's communicative activity expressly advocating election of each to federal office

and promoting the policy positions that each takes as such a candidate.... * * *

45. As candidates for state office in the future, and as members of the Massachusetts Libertarian Party, Plaintiffs Howell and Cloud will be injured by the editorial control and discriminatory economic burdens and penalties placed by the BCRA/FECA upon: (a) making public communications that refer to a clearly identified candidate for federal office, including communications that do not expressly advocate a vote for or against a candidates; (b) engaging in voter registration activities conducted within 120 days of a federal election; and (c) engaging in voter identification, get-out-the-vote, and generic campaign activities conducted in connection with an election in which a candidate for federal office is on the ballot.

CLAIMS FOR RELIEF
COUNT I
(Unconstitutional Prior Restraint and Editorial Control)

* * *

47. The BCRA/FECA, by distinguishing between political communications related to a campaign for election to a federal office and such communications not related to such an election, including, but not limited to, such distinctions as "express advocacy" and "issue advocacy," "electioneering communications" and non-electioneering communications, "federal election activity," and other than federal election activity, and requiring persons and entities engaged in political communications related to a campaigns for election to a federal office, whether such communication expressly advocates the election or defeat of a candidate for election to a federal office, promotes or supports, or attacks or opposes, such a candidate, or merely refers to such candidate, to comply with certain

registration and forced disclosure requirements and financial restrictions limiting such activity, has placed upon Plaintiffs an unconstitutional system of prior restraint, including licensing regulations, editorial controls, and discriminatory economic burdens and penalties based upon the subject matter content of speech.

* * *

COUNT II
(Unconstitutional Discriminatory Licensing System)

* * *

50. By exempting broadcasting stations, newspapers, magazines, and other periodicals owned by persons or entities who are not political parties, political committees, or candidates for election to federal office from the licensing system, editorial control and economic regulations administered by the FEC with respect to political communications related to campaigns for election to federal office * * * BCRA/FECA has placed upon Plaintiffs unconstitutional prior restraints, editorial control, and economic burdens through discriminatory registration requirements, reporting regulations, and disclosure requirements not placed upon such broadcasting facilities, media entities and persons.

* * *

COUNT III
(Unconstitutional Editorial Control of Electioneering Communications)

* * *

53. By exempting broadcasting stations, newspapers, magazines and other periodicals owned by persons or entities who are not political parties, political committees, and candidates for election to federal office from the disclosure, reporting and contribution limitations governing "electioneering communications," BCRA/FECA has placed upon Plaintiffs unconstitutional editorial control through discriminatory reporting regulations, disclosure requirements, and economic burdens and penalties, not placed upon such exempt entities and persons.

* * *

COUNT IV
(Unconstitutional Discriminatory Burden upon Plaintiffs GOA-PVF and CUPVF)

* * *

56. By enacting BCRA, Congress has raised the individual contribution limitation to candidates and their authorized campaign committees, and to political parties, and provided for automatic raises of such limits indexed to inflation, but has not raised the individual contribution limit to independent political committees, nor indexed the current limit to inflation.

57. By * * * failing to raise such limits and to index such limits with respect to political committees functioning independently from candidates, their authorized campaign committees, or political parties, the BCRA/FECA imposes a discriminatory economic burden and penalty upon GOA-PVF and CUPVF, both of which engage in activities expressly advocating the election or defeat of candidates for election to federal office independently from such candidates and their committees and such political parties.

* * *

COUNT V
(Unconstitutional Discriminatory Editorial Control of Political Party Candidates)

* * *

60. By imposing new rules defining "coordinated" campaign expenditures, and, further, by targeting political parties and their candidates designed to limit the impact of "soft money" in the conduct of campaigns for election to federal office, BCRA/FECA has placed significant discriminatory editorial control and economic burdens and penalties upon such political parties and their candidates.

61. By imposing new rules upon "federal election activity" limiting state and local political parties, and upon candidates for state office, BCRA/FECA has placed significant editorial control and economic burdens and penalties upon such parties and their candidates.

* * *

WHEREFORE, Plaintiffs respectfully pray that a three-judge court be convened and that said three-judge court hear this action, and upon such hearing:

1. Declare that the provisions of the BCRA and FECA, as challenged, violate the Plaintiffs' rights under the Freedom of the Press guarantee of the United States Constitution.

2. Permanently enjoin and restrain Defendants, their agents, and assistants from enforcing, executing, and otherwise applying the challenged provisions against

defendants and others in any and all respects in which the same may be found to violate the Freedom of the Press guarantee of the United States Constitution;

3. Award Plaintiffs costs and reasonable attorney's fees against Defendants; and

4. Grant and order such further relief as the Court may deem just and proper.

REPORT OF JAMES C. MILLER III*

Introduction

My name is James C. Miller III, and I am Chairman of CapAnalysis, an economic, financial, and regulatory consulting firm associated with the law firm Howrey Simon Arnold & White, with offices in Washington, DC, California (various locations), Houston, Chicago, London, and Brussels. I hold a Ph.D. in Economics from the University of Virginia (1969), a B.B.A. in Economics from the University of Georgia (1964), and am the author or co-author of over 100 articles in professional journals and nine books, the most recent of which is *Monopoly Politics*, published in 1999 by the Hoover Institution Press at Stanford University. (A copy of this book appears as Attachment A.) Before joining CapAnalysis, I held various academic and research posts and served in government, most recently as Director of the U.S. Office of Management and Budget and Member of President Reagan's Cabinet (1985-1988). Before that, I served as Chairman of the U.S. Federal Trade Commission (1981-1985), an agency which has a responsibility to enhance competition -- a matter of particular relevance here. In 1994 [*2] and again in 1996, I ran (unsuccessfully) for the U.S. Senate from Virginia. In 1998, I served as Treasurer of my wife's (Demaris H. Miller's) unsuccessful campaign for the U.S. House of Representatives to represent the 8th District of Virginia, and then again in 2000, I was involved in my wife's (unsuccessful) campaign for that same office.

A copy of my curriculum vitae appears as Attachment B. In the past four years, I have testified (in court) in only one

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* Pagination of this report as submitted to the District Court appears in brackets with an asterisk, *e.g.*, [*#].

case as an expert witness: Maritrans v. United States, #96-483C, U.S. Court of Federal Claims.

Summary of Analysis and Conclusions

In this report, I address, first, the applicability of economic principles to the political marketplace. As I outline in *Monopoly Politics*, campaigns are a manifestation of the market for political representation. Just as in commercial markets, where sellers compete for consumers, in political markets, candidates compete for voters. The propensity of commercial enterprises to limit the ability of new entrants has its counterpart in political markets, where incumbents have a propensity to limit the ability of challengers to mount successful campaigns.

Second, I describe the benefits of incumbency – and the obverse, the obstacles faced by challengers. I describe not only the *natural* advantages such as having invested in advertising and other messages to become well known, but also, and more importantly, the *contrived* advantages of incumbency (and the obstacles imposed on challengers). These include the taxpayer-financed advantages of subsidized communications for incumbents (TV and radio studios, franked mail, *et cetera*) and the ways the office is abused to increase the chances of reelection, but, more importantly, the ways campaign rules are "rigged" to benefit incumbents and penalize challengers.

Third, I describe in more detail the steps a candidate has to undertake just to run for Federal office. I show that complying with current Federal election laws and the [*3] rules promulgated by the Federal Election Commission (FEC) impose a differentially heavy burden on challengers. I also show that the new Bipartisan Campaign Reform Act (BCRA) of 2002 further increases the advantage enjoyed by incumbents and heightens the discrimination faced by challengers. Finally,

I show that the requirements are so burdensome that, in effect, they amount to a candidate's having to secure a "license" from the government in order to compete for political representation. Such requirements not only increase costs, especially for challengers, but limit candidates' and their supporters' freedom to control how they run their own campaigns.

Fourth, I describe how political markets would perform without the anti-competitive constraints presently incorporated in Federal campaign laws and regulations. I conclude that with their removal the market for political representation would be much more competitive and that voters would be better served, just as consumers are better served by competition in commercial markets.

I. Campaigns and the Market for Political Representation

Although most Americans spend little time considering the government's impact on their daily lives, the importance of decisions made in political markets rivals that of decisions made in the commercial sector. A quick look at the size of the Federal and state governments clearly indicates the magnitude of political decision-making. For fiscal year 2001, Federal expenditures topped $1,936 billion, while the 50 states spent nearly $1,293 billion. Combined, these two levels of government accounted for 32 percent of the nation's GDP ($10,082 billion).

Just how governments go about deciding what to spend and how to finance those expenditures has been the subject of intensive study.[1] One key outcome of the [*4] research is a

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[1] Much of this research comes out of the sub-discipline of economics and political science known as "public choice." For his contributions to the development of public choice, James M. Buchanan of George Mason University received the Nobel Prize for Economic Science in 1986.

recognition that elected officials respond to incentives just as producers and sellers in commercial markets. Elected officials compete for voters in elections, just as producers and sellers compete for consumers in the commercial marketplace. Accordingly, the type of analysis economists have applied routinely to assess the efficiency and effectiveness of commercial markets can also be used to assess efficiency and effectiveness of political markets. That this is possible becomes clearer when we recognize that in most relevant ways commercial and political markets are very much alike.

In commercial markets, providers compete for consumers' dollars. In political markets, candidates compete for citizens' votes. In commercial markets, the ability of providers to step up to the plate, make offerings to the public, and *communicate* what they have to offer is of vital importance in assuring consumers of the most value for their money. In broad terms, markets are said to be efficient (and effective in serving consumers' wants) when competition is vigorous and sellers have ample opportunities to communicate their offerings.

In a similar manner, political candidates compete for the attention of citizens, soliciting their votes at the ballot box. Just as with commercial markets, political markets are efficient (and effective in responding to citizens' preferences) when candidates are able to step up to the plate, make offerings to the public, and *communicate* what they have to offer to prospective voters.[2]

There are differences between commercial markets and political markets, but they are not particularly material for the

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2 For more on the similarities and differences between commercial markets and political markets, see *Monopoly Politics*, Chapters Two through Four.

analysis at hand. In the latter, the voters choose a single person to represent their interests. But choosing a representative in a political [*5] market is very much like choosing a retailer in a commercial market.[3] The retailer serves as the consumer's "agent" in picking a line of products or services from which to choose. Consumers typically do not survey all the goods or services offered for sale, but instead rely on stores such as Wal-Mart, Winn-Dixie, and their local insurance broker to search through the available product and service offerings and carry a select few. This makes the consumer's effort to find a good buy much simpler, but in doing so he or she puts a certain amount of trust in the judgment of the retailer chosen. If, however, the consumer finds over time that the retailer selects poor product or service lines, he or she will pick a better "agent."

In political markets, voters choose an agent to represent them in collective decision-making. Rather than survey all of the political issues facing Congress, inquire into the pros and cons of each, form an opinion, and then take part in a massive referendum on each and every one, voters choose representatives whose job it is to review all of these issues and make informed judgments. Just as in commercial markets, if citizens find that their agent does not serve them well, they will chose someone else -- that is, unless obstacles prevent or otherwise impede their ability to select the best person.

Political markets have equivalents to franchises in commercial markets. They are interest groups and, especially, political parties. In commercial markets consumers normally frequent those establishments that have earned their trust as agents. They gravitate towards these places because they have

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3 The following discussion replicates points made in Donald Wittman, "Why Democracies Produce Efficient Results," *Journal of Political Economy*, 1989, pp. 1395-424.

learned that a particular establishment consistently gives good advice, offers low prices, has outstanding service, or any number of other factors of importance. The reputation earned by [*6] establishments from meeting customers' expectations consistently can be leveraged through franchising. A consumer traveling far from home knows that the McDonald's on the road will serve the same menu, with the same quality, to which they are accustomed. This reliance on a firm's reputation to deliver value is the principal reason for franchises.

In political markets the equivalent to a commercial franchise is a political party, or to a lesser extent interest groups. Individuals faced with limited time and resources may choose to rely upon the label, Democrat or Republican. Or perhaps the citizen may take note of the opinions offered by the many interest groups such as the National Rifle Association, Greenpeace, labor unions, or the countless other organizations that take positions on political philosophy and/or policy issues. These groups do more than just inform voters: they also pressure the candidates to remain true to the principles they espouse. If a candidate (or elected official) diverges too far, the group may withdraw its support, just as Burger King might pull its franchise from stores that fail to perform.[4]

Incentives to innovate exist in both markets. Business firms spend considerable resources to develop new products and services -- to gain advantage over their competitors. In a similar manner, candidates (and their parties) put a great deal of effort and expense into making them more appealing to voters and gaining an advantage over their opponents. This can take the form of researching an issue, developing a unique solution, and communicating it to prospective voters. It can

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[4] Political parties withdraw their support of candidates – especially incumbents – very rarely.

also take the form of polling in an effort to probe and assess the opinions and wishes of the public. For both politicians and businesses, the most important development is irrelevant if nobody knows about it. The popular saying, "Build a better mousetrap and [*7] the world will beat a path to your door," is not quite accurate, as the world needs to be informed and sold on the new idea.

Would-be agents in both commercial and political markets solicit our support. In commercial markets, it is called advertising; in political markets, it is called campaigning. With respect to purpose there is really no difference between the two. In commercial markets producers promote their prices, qualities, and services, and sometimes even point out the inferior features of their competitors' offerings, while in political markets, candidates promote their agendas, their character, their histories on the issues, and on occasion suggest flaws in their opponents' character or the positions they take. In both cases the purpose is to inform about attributes that are expected to be decisive to the intended recipient.

As mentioned earlier, for commercial markets to be efficient and effective, they must be competitive. That is, providers must be free to make offerings and "compete" for business. That simple notion is what underlies the antirust laws and their enforcement. The reason is that, as Adam Smith observed over two centuries ago,

> People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.[5]

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[5] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (New York: Modern Library, 1937), p. 128.

Just as the ability to collude and exclude rivals in commercial markets leads to higher profits, higher prices, lower quality, and less innovation, collusive/exclusionary behavior in political markets makes life better for elected officials to the detriment of voters. Elected officials who are able to exclude, or even disadvantage, rivals have more power and influence, can more easily ignore their constituents, and can enjoy an easier lifestyle, facing less pressure to innovate, campaign, and engage in fundraising. [*8] The effects on citizens and voters, however, are like the effects of monopoly on consumers. The range of options is limited, the overall quality of service is diminished, accountability suffers, officials more frequently respond to vested interests rather than the electorate at large, deliberations are less transparent, and citizens have less information about the candidates, their qualifications, and their positions. In the same way that a monopolistic commercial market is inefficient and ineffective in serving consumers, a monopolistic political market is inefficient and ineffective in serving the interests of citizens.

The methods elected officials use to advantage themselves and to erect obstacles to challengers is covered in the next section. But it is important to focus on the fact that political agents have the same incentives to restrict competition as do business enterprises. Their legal liability, however, is far different. To limit anticompetitive practices in commercial markets, there are Federal and state antitrust laws, enforced by two Federal agencies, the Department of Justice and the Federal Trade Commission, numerous state Attorneys General, and the private antitrust bar. There is no corollary in political markets. Elected officials face no sanctions for anticompetitive activity. To be sure, there are Federal election laws, and the FEC, among other things, is responsible for monitoring campaign contributions and how they are spent. But as we shall see, these laws and the FEC impose far greater harm by protecting incumbents and disadvantaging challengers, than

any good they do in assuring the integrity of the electoral process.

II. Benefits Enjoyed by Incumbents and Obstacles Faced by Challengers

For competition in political markets to be vigorous there must be a reasonably level playing field -- one free of artificial advantages for one or more candidates versus others. This is not to suggest a need for rules to restrict natural advantages. Indeed, in [*9] an ideal system the natural advantages of the candidates would shine through, whether these are a more popular platform, superior organizational or communication skills, or even name recognition from previous accomplishments.[6] What does need to be restricted, and what hampers the efficiency and effectiveness of political markets, are contrived advantages for certain candidates. Without exception, contrived advantages are on the side of, and are orchestrated by, incumbents.

Aside from legitimate, natural advantages, there are two types of contrived advantages associated with incumbency. The first type is associated with abuse of the office for political gain – increasing the probability of reelection. The second is more pernicious – rigging the campaign rules to advantage incumbents and to place obstacles in the path of challengers. The first is explained in this section; the second is explained in the section that follows.

Members of Congress provide themselves with a full range of free services that are not available to their more cash-starved challengers. Members of Congress have free mail

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6 The analogy in commercial markets should be evident: more desirable location and establishments, superior product/service line, more effective advertising, and better reputation.

privileges (referred to as the frank),[7] telephone and Internet access,[8] and well-designed web pages.[9] Some people may be surprised at the magnitude of these free services. For example, in a recent election cycle, of the 20 largest spenders on the frank, 11 Members spent more on this privilege than their challengers spent on their [*10] entire campaigns.[10] And benefits such as frank do help. Albert Cover and Bruce Brumberg found that a control group receiving franked mail had a higher opinion of the incumbent than those who did not.[11] Members of Congress also derive a significant advantage through casework out of their district or state home offices. The increasing flow of indecipherable and ambiguous new laws (and ensuing regulations) increase the demand for casework services – which, of course, only incumbents can provide. Evidence of this can be found in the growth of House and Senate staff assigned to Members' district and state offices. From 1980 to 1997, the number of House staffers assigned to offices in the districts increased from 2,534 to 3,209, and for

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7 There are modest restrictions on use of the frank. See *Monopoly Politics*, pp. 77-78.

8 There are also modest restrictions on the use of these instruments for political purposes. See *Monopoly Politics*, p. 76.

9 When governments join the "digital revolution," elected officials typically commandeer for themselves the up-front cost (web pages, e-mail, *et cetera*). See Cindy Crandall and Jeff Eisenach, *The Digital State*, 1998 (Washington: Progress & Freedom Foundation, 1998).

10 National Taxpayers Union and Federal Election Commission. The point made about the incumbent's spending on franked mail versus challengers' campaign spending was noted in Steve Symms, "Campaign Finance Reform Gainers," *Washington Times*, August 13, 1997, p. A14.

11 Albert D. Cover and Bruce s. Brumberg, "Baby Books and Ballots: The Impact of Congressional Mail on Constituent Opinion," *American Political Science Review*, 1982, pp. 347-59.

the Senate offices in the states, the number increased from 953 to 1,366. (The *proportion* of local-office staff vs. total staff increased as well: from 34 percent to 44 percent for the House and from 25 percent to 31 percent for the Senate.[12]) Academic research shows how beneficial constituent services are in garnering support and creating a positive image of the incumbent.[13] And [*11] it is apparent that this has not gone unnoticed by the incumbents themselves. For example, Morris Fiorina found that incumbents respond to close elections by increasing allocations to casework.[14]

Some might argue there is nothing wrong with such a response by the incumbent. They might suggest that the incumbent is only seeking to connect more closely with the

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12 Norman S. Ornstein, Thomas E. Mann, and Michael J. Malbin, *Vital Statistics on Congress, 1997-1998* (Washington, D.C.: Congressional Quarterly, 1998).

13 Yiannakis found that constituent service is especially effective in attracting supporters of the incumbent's challenger. See Diana Evans Yiannakis, "The Grateful Electorate: Casework and Congressional Elections," *American Journal of Political Science*, 1981, pp. 568-80.

Serra and Cover found that constituent service creates a positive evaluation of the incumbent and has the most impact on constituents where only a small portion of them identify with the incumbent's party. See George Serra and Albert D. Cover, "The Electoral Consequences of Perquisite Use: The Casework Case," *Legislative Studies Quarterly*, 1992, pp. 233-46.

Serra and Moon found that voters respond to constituent service and implied that constituent service might be able to offset policy differences between the incumbent and his or her constituents. See George Serra and David Moon, "Casework, Issue Position, and Voting in Congressional Elections: A District Analysis," *Journal of Politics*, 1994, pp. 200-13.

14 Morris Fiorina, "Some Problems in Studying the Effects of Resource Allocation on Congressional Elections," *American Journal of Political Science*, 1981, pp. 543-67.

voters, and that such a response is a sign of competition. To some extent this is true. Members of Congress have legitimate reasons to communicate with constituents and to help them on occasion. There are two problems, however. First, the evidence is stark that the system is abused for political gain. Second, this activity is funded by taxpayers, a source not available to challengers. In any event, the widespread abuse of these free services constitutes a contrived advantage that makes the playing field less even, the political market less competitive, and citizens less well served.

Incumbents also have at their disposal the ability to send district- or state-specific spending back to their constituents. This practice, more commonly known as "pork spending," can play a large role in protecting incumbents from challenge. This is particularly true for more senior incumbents, who because of their tenure are more effective at bringing money back to their districts or states. Rational voters recognizing that the flow of pork is an increasing function of tenure will be more apt to return their Congressman for another term.[15] Research has found that incumbents are effective in taking advantage of these contrived advantages. Robert Stein and Kenneth Bickers found that vulnerable incumbents aggressively pursue pork spending,[16] and separately [*12] that the success of incumbents in bringing back agency grants influences a potential challenger's decision to run.[17] According to the organization Citizens Against Government Waste, this

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15 Gerald W. Scully, "Congressional Tenure: Myth and Reality," *Public Policy*, 1995, pp. 203-19.

16 Robert M. Stein and Kenneth N. Bickers, "Congressional Elections and the Pork Barrel," *Journal of Politics*, 1994, pp. 377-99.

17 Kenneth N. Bickers and Robert M. Stein, "The Electoral Dynamics of the Federal Pork Barrel," *American Journal of Political Science,* 1996, pp. 1300-26.

tool, like so many others, has been growing over recent years, doubling from $6.6 billion to more then $13 billion over the five-year period 1993 to 1998.

As mentioned in the previous section, voters have an incentive to reelect more senior Members due to their effectiveness in delivering pork spending. This incentive also extends to the committee system, whereby Members jockey to obtain key positions on various committees that have oversight roles in important areas. Getting assigned to a powerful committee can enable an incumbent to gain additional contributions or support from voters who want to keep their representative in a position of power. For example, Bennett and Loucks found that being appointed to the House Banking Committee increases a Member's contributions from finance political action committees (PACs).[18] Additionally, Mark Crain and John Sullivan found that for Members belonging to the majority party, incumbents assigned to committees having significant control over industries under their jurisdiction significantly increased their vote margins between the 1988 and 1990 elections.[19] These empirical results, and the others like them,[20] are not [*13] surprising, given the tremendous

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18 Randall W. Bennett and Christine Loucks, "Savings and Loan and Finance Industry PAC Contributions to Incumbent Members of the House Banking Committee," *Public Choice,* 1994, pp. 83-104.

19 Mark W. Crain and John T. Sullivan, "Committee Characteristics and Re-election Margins: An Empirical Investigation of the U.S. House," *Public Choice,* 1997, pp. 271-85.

20 For example, Loucks found an increase in PAC contributions from appointment to the Senate Banking Committee. Christine Loucks, "Finance Industry PAC Contributions to U.S. Senators, 1983-88," *Public Choice,* 1996, pp. 219-29.

Kroszner and Stratmann found that committee members get more money from PACs with an interest in their jurisdictions, and the contributions rise

power exercised by those committees and by the members who serve on them.[21]

Another contrived advantage is the ability of incumbents to pressure donors for campaign contributions when there is little evidence of challenge, and to carry over these resources from election to election, continually growing their reserves in order to ward off any potential challenge. Janet Box-Steffensmeier found war chests particularly effective in deterring high-quality challengers.[22] This is not surprising, given that challengers must recognize the enormous resources stacked up against them. This benefit no doubt helps to explain why, for instance, after the 1996 election cycle incumbents' average cash on hand was over $175,000, and those

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with seniority. Randall S. Kroszner and Thomas Stratmann, "Interest Group Competition and the Organization of Congress: Theory and Evidence from Financial Services Political Action Committees," *American Economic Review*, 1998, pp. 1163-87.

Anagnoson found that during election years federal agencies speed up their approval of grants to the constituents of representatives who are on committees with authority over them. Theodore Anagnoson, "Federal Grant Agencies and Congressional Election Campaigns," *American Journal of Political Science*, 1982, pp. 547-61.

21 Roberts found that the death of Senator Scoop Jackson (then a member of the Senate Armed Services Committee) depressed the prices of stocks of companies in Jackson's state and raised the prices of stocks in the home state of his successor. Brian E. Roberts, "A Dead Senator Tells No Lies: Seniority and the Distribution of Federal Benefits," *American Journal of Political Science*, 1990, pp. 31-58.

22 Janet Box-Steffensmeir, "A Dynamic Analysis of the Role of War Chests in Campaign Strategy," *American Journal of Political Science*, 1996, pp. 352-71.

incumbents who won with more then 60 percent of the vote had cash on hand averaging more than $230,000.[23]

III. The Role of Federal Election Laws and FEC Rules in Limiting Competition

Of even greater importance and effect are the *contrived* advantages for incumbents created by the Federal campaign laws and regulations. It is important to bear in mind the asymmetry between commercial markets and political markets with respect to monopolization. In commercial markets, there is no organized forum for the [*14] exchange of information and discussion of ways to limit competition. Indeed, if there were such a forum, not to mention if the forum succeeded in orchestrating actions to limit competition, the participants would be liable for criminal prosecution under the Federal antitrust laws. On the other hand, in political markets, incumbents have the means as well as the incentive to limit competition. *They make the laws.* They not only have a legal forum in which to discuss ways of limiting competition, their actions to carry out policies to limit competition do not create for them legal liability of any sort. Although usually debated in high-sounding, public interest rhetoric, these laws (and subsequent enabling regulations) are understood to have great impact in limiting the ability of challengers to mount serious campaigns.[24]

A. Ways Federal campaign laws limit competition

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23 Financial activities of house candidates, 1996, FEC (www.fedc.gov/1996/dates).

24 It is really not necessary to prove motive here. It is the effect of the laws in limiting competition, whatever their official or secret rationale.

The ways Federal and state election and campaign-finance laws limit competition are varied. Only some of the major ones are addressed here.[25]

Perhaps recognizing the threat from third-party challengers, ballot access laws have been structured to reduce competition. Theodore Lowi concluded that state bans on "fusion tickets" (the nomination of the same candidate by more then one political party) have a simple objective -- to eliminate competition.[26] In a similar vein, Hamilton and Ladd found that ballot structure affects turnout (particularly for lesser-known candidates), party-line voting, and election results in partisan districts.[27]

[*15] Additionally, some states allow incumbents to have significant control in the primary process. For examples: in Virginia incumbents can demand a primary if they had been nominated that way the previous election cycle; Louisiana's open seat primary system, which favors incumbents, only saw one incumbent defeated in 22 years; and Connecticut requires a candidate for a party's nomination to receive at least 15 percent of the votes at the nominating convention to qualify for the primary. Also, incumbents work with their state legislatures and governors to formulate redistricting plans in such a way as to protect, and possibly improve, their chances for reelection. David Gopoian and Darrell West found that incumbents were more likely to gain, rather than lose, from

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25 For a more thorough examination, see *Monopoly Politics,* esp. Chapter Five.

26 Theodore J. Lowi, "A Ticket to Democracy," *New York Times*, December 28, 1996, p. A27.

27 James T. Hamilton and Helen F. Ladd, "Biased Ballots?: The Impact of Ballot Structure on North Carolina Elections in 1992," *Public Choice,* 1996, pp. 259-80.

redistricting because legislatures tended to give incumbents of both parties a greater proportion of their party's voters.[28] Not surprisingly, additional research has found that if there is a bias in the redistricting process it tends to favor the state's dominant party.[29]

Passage of FECA in 1974 dramatically changed the landscape in which campaigns are funded and undertaken. The act created a tax-return check-off for funding presidential campaigns, placed limits on spending by presidential candidates who accept matching funds, and limited the amounts individuals could contribute to presidential and congressional campaigns. (The act also limited spending on congressional campaigns, but the U.S. Supreme Court later held this provision unconstitutional.[30])

[*16] In researching the academic literature in the process of writing of *Monopoly Politics*, I found overwhelming agreement among scholars that the major effect of the act has been to help incumbents further fend off challengers. (Although I have not followed the literature as intensely since 1999, I am aware of no further research that is of a contrary nature.) I also found evidence that the principal motivation for the act was self-interest. Peter Aranson and Melvin Hinich

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28 David J. Gopoian and Darrell M. West, "Trading Security for Seats: Strategic Considerations in the Redistricting Process," *Journal of Politics*, 1984, pp. 1080-96.

29 Gary King, "Representation through Legislature Redistricting: A Stochastic Model," *American Journal of Political Science,* 1989, pp. 787-824; Janet Campagna and Bernard Grofman, "Party Control and Partisan Bias in the 1980s Congressional Redistricting," *Journal of Politics,* 1990, pp. 1242-57; and Bruce E. Cain, "Assessing the Partisan Effects of Redistricting," *American Political Science Review,* 1985, pp. 320-33.

30 See *Buckley v. Valeo*, 424 U.S. 1 (1976).

showed that the limits on contributions disproportionally constrain challengers more than incumbents and thereby benefit incumbents.[31] Abrams and Settle found that the Democrats' support of the 1974 bill was based on self-interest -- that in the absence of limits Gerald Ford would have won the 1976 presidential election.[32] As another example, Bender found that even in the bill-forming stage, when various spending limits were considered, Members' votes were highly correlated with forecasts of the effects such limits would have had on their chances for reelection.[33] And in *Buckley,* the Supreme Court, recognized that,

> Since an incumbent is subject to these limitations to the same degree as his opponent, the Act, on its face, appears to be evenhanded. The appearance of fairness, however, may not reflect political reality. Although some incumbents are defeated in every congressional election, it is axiomatic that an incumbent usually begins the race with significant advantages.[34]

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31 Peter H. Aranson and Melvin J. Hinich, "Some Aspects of the Political Economy of Election Campaign Contribution Laws," *Public Choice,* 1979, pp. 435-61.

32 Burton A. Abrams and Russell F. Settle, "The Economic Theory of Regulation and Public Financing of Presidential Elections," *Journal of Political Economy,* 1978, pp. 245-57.

33 Bender, "An Analysis of Congressional Voting on Legislation Limiting Congressional Expenditures," *Journal of Political Economy*, 1968, pp. 1005-21.

34 As quoted in Aranson and Hinich, "Some Aspects," p. 451.

To see how the 1974 act and subsequent restraints on contributions help incumbents, recall that a common theme in these reforms is that it makes raising money more difficult and spending it less effective. Research has shown that [*17] constraining both incumbent and challenger fundraising/spending harms challengers much more than incumbents. A slew of research has shown that the marginal gain in votes per dollar of spending is substantially greater for challengers.[35] That is, a dollar spent by a challenger will increase his or her vote (or vote margin) by more than a dollar spent by an incumbent will increase his or her vote (or vote margin). The principal reason is that challengers (and their platforms) are typically not as well known as the incumbents they are challenging. Also, since they typically spend far less on their campaigns than do incumbents, their expenditures are especially productive in getting name recognition and in communicating information about themselves and their platforms. On the other hand, incumbents usually have

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35 See, for example, Aranson and Hinich, "Some Aspects"; Bruce Bender, "An Analysis of Congressional Voting," pp. 1005-21; Amihai Glazer, "On the Incentives to Establish and Play Political Rent-Seeking Games," *Public Choice*, 1993, pp. 139-48; Gary C. Jacobson, "Money and Votes Re-considered: Congressional Elections, 1972-1982," *Public Choice*, 1985, pp. 7-62, and "The Effects of Campaign Spending in House Elections: New Evidence for Old Arguments," *American Journal of Political Science*, 1990, pp. 334-62; Christopher Kenny and Michael McBurnett, "A dynamic Model of the Effect of Campaign Spending on Congressional Vote Choice," *American Journal of Political Science*, 1992, pp. 923-37; John R. Lott, "Does Additional Campaign Spending Really Hurt Incumbents?: The Theoretical Importance of Past Investments in Political Brand Name," *Public Choice*, 1991, pp. 87-92; John L. Mikesell, "A Note on Senatorial Mass Mailing Expenditures and the Quest for Reelection," Public Choice, 1987, pp. 257-65; Dennis C. Mueller, *Public Choice II* (New York: Cambridge University Press, 1989), pp. 209-12; K. Filip Palda and Kristian S. Palda, "Ceilings on Campaign Spending: Hypothesis and Partial Test with Canadian Data," *Public Choice*, 1985, pp. 313-31; and Thomas J. Scott, "Do Incumbent Campaign Expenditures Matter?," *Journal of Politics*, 1989, pp. 965-76.

extensive name recognition already, and their positions on issues are fairly well know. In addition, they will have taken advantage of free press coverage and the many other perks of office discussed above. As Jeff Milyo observed:

> The evidence…strongly suggests that marginal spending by incumbents has little impact on their electoral success. Even shocks to spending of $100,000 or more produce no discernible impact on incumbent vote shares.[36]

[*18] In sum, an incumbent knows that additional spending on his or her own campaign will be of marginal value in increasing votes (or vote margin), but that spending by an opponent will have a dramatic, threatening effect. Money for challengers is therefore absolutely essential if a race is to be competitive, and if the interest of citizens are to be served.. Challengers tend to be relatively unknown, and without significant resources it is nearly impossible for them to have any chance at success. Thus, it is in the interest of the incumbent to limit fundraising overall and to encumber the effectiveness of spending.

One indication of the effectiveness of limits on a challenger's ability to accumulate the resources necessary to wage a competitive campaign can be found in discussions around various proposals to reform the campaign finance laws. Consider the proposal in one of the early versions of the McCain-Feingold/Shays-Meehan bill to limit spending in House races to $600,000 per election cycle. According to Bradley Smith (now a Member of the FEC), in 1996, every incumbent who spent less then $500,000 won versus a meager

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36 Jeff Milyo, "The Electoral Effects of Campaign Spending in House Elections," Citizens' Research Foundation, University of Southern California, June 1998, p. 27.

3 percent of challengers who spent that little. Yet challengers who spent between $500 thousand and $1 million won 40 percent of the time, and of the six who spent more then $1 million, five of them won. With respect to the proposal's variable limits for Senate races (from $1.50 million to $8.25 million per election cycle), in 1994 and 1996 every challenger who met the limit lost and every incumbent won.[37] It is not surprising, then, that incumbents do not like their odds against well-funded challengers and seek to limit their ability to raise such resources and to spend them effectively.

[*19] The act also advantages incumbents in another way not so generally recognized. By placing restrictions on the ability of *candidates* to communicate what they have to offer, the act increases the role and influence of the media, which are expressly exempted from FECA and BCRA with respect to news stories, commentaries, and editorials. Incumbents have a considerable advantage here: they have taxpayer-paid press spokesmen; they *make* news, and thus have more access to the media; and they have access to "inside information," which they communicate to, and curry favor with, the press. The reporting requirements also accentuate the role of the media in campaigns (and diminish the role of the candidates): in effect, this information is a subsidy to the media – giving it stories that it otherwise would not have been able to secure so easily.[38]

B. Bipartisan Campaign Reform Act of 2002

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37 Bradley A. Smith, "Why Campaign Finance Reform Never Works," *Wall Street Journal*, March 19, 1997, p. A19.

38 Under the act, a newspaper, for example, may make news-story, commentary, and editorial (in-kind) contributions to a candidate *unless* the newspaper is owned by the candidate. However, a supporter of the candidate may purchase a newspaper and run news stories, commentaries, and editorials on behalf of the candidate without restraint.

Earlier this year, Congress had an opportunity to address some of the anticompetitive features of FECA. On the whole, however, it made matters worse.

Title I of BCRA makes it more difficult for political parties to engage in educational activities that mention the names of candidates. While it has the laudable goal of limiting the influence of "special interest money," it also limits the ability of parties to support challengers. Again, anything that makes it more difficult for candidates to get out their messages reduces the competitiveness of the political marketplace.[39]

Section 213 of BCRA says that a political party may engage in independent expenditures on behalf of a candidate *or* contribute to the candidate's campaign – but [*20] not both. This change further limits the ability of challengers, especially, to acquire the requisite funds to mount a serious campaign.

Section 304 of the BCRA says, in effect, that contribution limits are warranted, but when a challenger appears on the horizon who is prepared to augment his or her campaign treasury out of his or her own pocket, the contribution limits are revised upward – but only for the opposing candidate(s). Furthermore, the candidate willing to provide full, or even partial, funding for his or her campaign must say so in advance, thus tipping off the competition to the campaign strategy. While technically the provisions contained in Section 304 would benefit a challenger facing a self-financing incumbent, the real import of the provision is to limit the ability of challengers to mount successful campaigns, since over the past years self-financing appears one of the few ways

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39 Section 103 of Title I waives the relevant restraints when the money is to be used to construct buildings to house the political parties.

challengers have been successful in creating competitive races.[40]

Section 305 of the BCRA requires candidates advertising over the electronic (radio, TV) and print media to reserve a portion of the message for a complete identification of the candidate on whose behalf the advertisement is placed. Although the amount of time/space required may not seem all that intrusive, the restraint constitutes a significant diminution in the effectiveness of ads, given that they are usually quite short in duration or space. Also, there is the further encumbrance that the requirement makes the ads somewhat off-putting and therefore even less effective. Again, anything that makes the expenditure of funds (such as on advertisements) less effective gives further advantage to the incumbent.

Sections 312 and 314 of the BCRA impose more severe criminal penalties for violations of Federal election laws and require the U.S. Sentencing Commission to [*21] establish sentencing guidelines for such violations. While not taking issue with the notion of requiring compliance with *bona fide* law, it is notable that such increased penalties, combined with the lack of familiarity with the act's various provisions faced by most challengers, makes it even less likely that a challenger would venture to enter a political contest.[41]

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40 See, for example, Larry J. Sabato and Glenn R. Simpson, "Money Talks, Voters Listen," *Wall Street Journal*, December 28, 1994, p. A12.

41 Given the incredible complexity of the campaign laws, challengers justifiably would be fearful of even innocent mistakes. Consider, for example, the final regulations and associated explanation and justification the FEC promulgated in February 9, 1995 regulating all expenditures by principal campaign committees designed to prohibit personal use. These regulations run 14 pages, in the Federal Register, are far from clear, and convey the notion that it is really impossible to write a clear rule, and

In a most blatant "everyone is equal, but incumbents are more equal than others" provision, Section 403 of the Act gives incumbents, but not challengers, the right to intervene personally before the court in any challenge to the constitutionality of any and all provisions of the Act. So, if the constitutionality of a particular provision whose effect is to advantage incumbents and to place obstacles in the way of challengers is questioned, the incumbent will be heard, but the challenger will not.[42]

The only provision of the BCRA that would seem to address the overwhelming advantage enjoyed by incumbents and the obstacles faced by challengers is Section 307, which increases the individual contribution limit from $1,000 per election cycle to $2,000, increases the individual aggregate (Federal-election) limit from $20,000 to $25,000, and indexes both limits for inflation. Two things are notable about these changes, however. First, the uneven treatment given to other limits is curious: the PAC contribution limit is neither changed nor indexed, and the contribution limits for state [*22] parties are raised, but are not indexed for inflation. Second, the doubling of the individual contribution limit places it in *real* terms below the limit the Supreme Court found constitutional in *Buckley*; an adjustment for inflation alone (not to mention the higher cost and greater scope of most Federal campaigns

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therefore violations must be left to the judgment of the FEC. Given that penalties under BCRA for knowing or willful violations involving making, receiving, and reporting contributions or expenditures can run as high as $25,000 and imprisonment of up to five years, novice would-be challengers might opt never to run for office.

42 Because of my experience in government, I am aware of the deference the courts afford Congress. But the instances with which I am aware go to broad policy issues. In this instances, the law is brazen its uneven treatment of those competing for the privilege of representing us: one set of rules for incumbents, another (less desirable) set for challengers.

today) would raise the limit to over $3,000.[43] The 25 percent increase in the aggregate limit doesn't even begin to adjust for inflation.

Thus, by further limiting the ability of contributors to fund campaigns, which in turn makes it more difficult for candidates to acquire requisite resources, BCRA comes down even harder on challengers and further increases the monopoly power found in the market for (Federal) political representation.

C. Federal election/campaign laws are equivalent to requiring a license

Dealing with the various Federal election and campaign laws and regulations has become so burdensome that in a real sense a citizen must obtain a *license* from the Federal government in order to run for public office. Consider that *before* a citizen may campaign for Federal office he or she must file certain forms, in certain ways, with the FEC and agree to abide by its rules and regulations.[44]

The candidate must have his or her campaign file an initial FEC report (directly with the FEC, in the case of a run for the House of Representatives, and with the Secretary of the Senate in the case of a run for the Senate) and send a copy to the relevant state agency. The candidate must set up a formal campaign committee, recruit a treasurer, and have that person

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43 See *Monopoly Politics*, p. 116.

44 Various matters trigger the requirement to file as a candidate, such as raising or spending over $5,000.

make the filing and all subsequent reports to [*23] the FEC.[45] (The candidate files only FEC Form 2: Statement of Candidacy.) When I served as treasurer of my spouse's campaign for Congress in 1998, I received, after the initial filing, the following from the FEC: (a) a pamphlet on committee treasurers, (b) a copy of the FEC's latest newsletter, *The Record*, (c) a copy of FEC Disclosure Form 3: Report of Receipts and Disbursements for an Authorized Committee, together with instructions, (d) a list of state offices where copies of all reports must be filed, (e) a reprint of an article describing how to file disclosure reports electronically, (f) a copy of the reporting schedule for the year, (g) a notice about the FEC's fax line, (h) an announcement of upcoming FEC conferences (with no indication whether they are optional or compulsory), (i) a compendium of Federal election campaign laws, and (j) a copy of the latest issue of the *Code of Federal Regulations* dealing with Federal elections. The number of pages totaled 618, and the package weighed 1 pound, 12.5 ounces. And that's not the end. Whether responding to often-indecipherable questions from the FEC's staff about filings or guessing about appropriate (vs. inappropriate) language to use in answering their questions or questions on the various FEC forms, the candidate is reminded constantly that in order to run for office he or she has to secure *and maintain* a license from the Federal government.[46]

To see what maintaining this license is all about, consider that a mistake on a report, no matter how immaterial, can result in frustrating and time-consuming dealings with the FEC. As an example, consider the letter of inquiry I received following a midyear report submitted more than one full year

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45 Moreover, according to the FEC, the treasurer has unlimited personal liability – surely an impediment, especially for challengers.

46 See *Monopoly Politics*, pp. 96-100.

after I had lost a primary election for the U.S. Senate. In part it reads:

> [*24] Your report discloses a … loan from the candidate on Line 13(a) of the Detailed Summary Page. It appears that this loan was used to finance expenditures made directly by the candidate (pertinent portion attached). Please note that expenses advanced by the candidate or other committee staff members constitute debts rather than loans; and should be reported in the following manner: the advance should be itemized as a contribution on Schedule A and listed as a memo entry. If, however, the advance was paid in the same reporting period in which it was made, the filing of a Schedule A is not required. When the repayment is made, the transaction should be itemized on a Schedule B supporting Line 17. If the ultimate payee (vendor) requires itemization, it should be listed on Schedule B as a memo entry directly below the entry itemizing the repayment of the advance. Continuous reporting (on Schedule D) of all outstanding debts is required. Please amend your report, if necessary.

What is not clear from the letter is that the problem stemmed from a transcription error in my report to the FEC, indicating that a major deposit to the campaign account had been made the day *after* the campaign had written a major check to a vendor.

The learning curve and costs involved in dealing with such reporting requirements are substantial and amount to maintaining a license to run for Federal office.[47]

IV. Political Markets in the Absence of Federal Laws and Rules Limiting Competition

Those who have been most adamant about the need for *stricter* regulation of Federal election campaigns no doubt will respond to the criticisms leveled above by suggesting that the alternative -- the elimination of anticompetitive restraints -- would be far worse. That is not the case. As outlined briefly below, a regime where current anticompetitive restrictions were removed would be far more competitive, and elected officials would respond much more efficiently and effectively to citizens' preferences.

An important caveat: the regime posited does not contemplate the removal of any laws and implementing regulations affecting who is allowed to contribute, fraud, and other criminal acts. That is a whole separate issue. What *is* posited is the repeal of [*25] anticompetitive laws and the elimination of anticompetitive regulations. Under this regime, corporations and unions would still not be allowed to contribute directly, voter fraud would still be a crime, and so would buying votes, bribing elected officials, *et cetera*. Although there are variations on what might be characterized as a regime free (or relatively free) of anticompetitive restraints, the following discussion assumes the repeal of virtually all of FECA and BCRA. It also assumes the

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47 It is worth noting that this license requirement gives incumbents another special advantage, for it says, in effect, that a challenger must give ample, and formal, notice to an incumbent that "I want your job."

disestablishment of the FEC and the withdrawal of all its rules.[48]

How would political markets perform under such a regime? Much more efficiently and effectively than at present – and relatively free of the unsavory practices critics are likely to wave as the inevitable consequence of any freeing up of current legal and regulatory requirements.

First, three "macro" issues. It will be said that with no limits on contributions, total expenditures on Federal campaigns would be exorbitant. Judged by spending on the commercial-market analogue -- advertising -- this is very unlikely. In *Monopoly Politics*, I conservatively estimate that spending (of all types) on Federal campaigns per dollar of "sales" is only half of what is spent on advertising (per dollar of sales) in the commercial sector.[49] Lifting the lid on contributions would not likely result in more than a *doubling* of campaign spending. In any event, the greatest increase in expenditures would be on the part of challengers, and this would make the political market more efficient and more effective.

In addition, it will be argued that without limits on contributions some groups in society would have "undue influence" on elected officials. The question is one of [*26] degree. Undoubtedly, some contributors have "undue influence" now. Would the practice be more widespread in the regime posited? Interests could contribute more, but to some extent their contributions would cancel out, as others, with opposite interests, competed for favors. On the other hand,

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48 These changes, of course, would not remove all forms of contrived advantages. See *Monopoly Politics*, esp. Chapter Six.

49 See *Monopoly Politics*, pp. 117-8.

"interests" and others would have alternatives to "purchasing" influence with elected officials – supporting challengers. As we shall see below, this makes all the difference.

It will also be argued that a lack of limits on contributions would lead to general corruption in political contests. Yet the evidence on this issue suggests otherwise. The States of Virginia and Texas have no limits on contributions by individuals in statewide elections, and there appears to be no more corruption in these political markets than in states having strict limits on contributions.

Without limits on contributions and limits on the productivity of expenditures (such as the form and content of messages), political markets would be much, much more competitive. Challengers would find it much easier to accumulate the resources necessary to mount effective campaigns. (For one thing, in the absence of disclosure, a contributor wanting to support a challenger would not have to worry that the incumbent might find out and seek retribution.) In contrast, to a considerable extent, it really does not matter how much money incumbents acquire, for, as discussed above, the marginal product of incumbent spending (in terms of votes or vote share) tends to be inconsequential, whereas it tends to be quite positive for challengers. The old adage in politics, "It doesn't matter how much money your opponent raises; what matters is whether you can raise enough to be competitive," is operative here.

The absence of a requirement for candidates to obtain a Federal "license" before running for office (committee, treasurer, initial filing, periodic filings, responding to inquiries, *et cetera*) and the removal of threat of prosecution because of violations of [*27] laws with which few are familiar, would make it possible for more citizens to run for Federal office. Also, with more resources with which to make a run,

candidates would be better able to communicate their agendas and their qualifications.

In a more competitive political market, elected officials would be more accountable. Without the assurance of so many contrived advantages in election contests, incumbents would no longer have so much "freedom" to ignore the wishes of citizens. They would have less room to maneuver and would be less responsive to "interest groups."

For those who believe transparency with respect to contributions is highly desirable, there would be a "market test" of that proposition. As did Governor George W. Bush when he ran for president, those seeking office might voluntarily publish their contributors (and amounts) on the Internet. This could be a ready source of differentiation between candidates and an important selling point. A candidate might publish on the Internet contributions not now required to be reported to the FEC. Candidates might also make other strategic decisions, such as refuse to accept funds from business, or labor, or other "interest" groups, if they thought such tactics would increase their chances for election.

The point is, a regime in which anticompetitive campaign laws and regulations were eliminated would not degenerate into "the law of the jungle." To the contrary, political markets would be more orderly, and far more responsive to the interests of the electorate.

REPORT OF PERRY WILLIS

1. My name is Perry Willis. I have spent the past 20 years working almost full time in direct professional involvement with state, local, and federal campaigns, and with state, local, and national Libertarian Party organizations. Because of my extensive practical experience with the real world effects of the federal campaign finance regulations, I have been asked to provide a report concerning those effects on challengers, and on Libertarian Party candidates in particular, both under the FECA and the BCRA. Actual experience with the real practical effects of campaign regulations has taught me a host of consequences of these laws that the scholarly studies in this area that I have read do not cover fully. I have agreed to provide this report and the cross-examine at no fee, only reimbursement for expenses. Below is a brief list of my professional experience followed by a summary of specific work activities as they relate to federal campaign regulation.

a. In 1980, I worked as a volunteer in San Diego, California for the Ronald Reagan for President campaign. When President Reagan failed to push proposals and veto legislation in keeping with his campaign promises, I became active in the Libertarian Party ("LP").

b. I managed Everett Hale's Libertarian for Congress campaign in 1982, and was involved with every aspect of a federal campaign at that level, from fundraising and campaign strategy and execution, to compliance with federal regulations.

c. In 1983, I served as Chair and Executive Director of the Libertarian Party of San Diego and was heavily involved in recruiting candidates for federal office.

d. In 1984, I served as Ballot Access Coordinator and Finance Director for David Bergland's Libertarian campaign for President, gaining extensive experience both with the difficulties of ballot access for minor parties in the United States, and the uneven effects of federal campaign finance regulation on minor party presidential campaigns.

e. During the first part of 1985, I served as Finance Director for the Libertarian Party of California.

f. For the latter half of 1985, through 1986, and into 1987, I served as the National Director of the Libertarian Party's Libertarian National Committee (LNC). As such, I was responsible for national party's overall strategy, including candidate recruitment and training, as well as fundraising, donor recruitment, and the staff work involved in complying with the federal campaign finance laws as they apply to national party committees.

g. In late 1987, I worked briefly for Congressman Ron Paul's Libertarian campaign for President.

h. In 1988, I worked as a consultant for Congressman Sam Steiger's Libertarian campaign for Governor of Arizona, and for an educational choice initiative in California.

i. In 1989 and 1990, I worked as a fundraising consultant for the Libertarian National Committee, and once again had to confront the difficulties minor parties face as a consequence of the federal campaign finance laws.

j. During the latter part of 1991 and the first part of 1992, I served as Chief of Staff (campaign manager) for Andre Marrou's Libertarian campaign for president. I was responsible for every aspect of the campaign's strategy and execution, including ballot access, media relations, candidate scheduling and travel, relations with state and local party organizations and candidates, volunteer coordination, fundraising via direct mail, telephone solicitation, campaign events, and personal meetings with donors, as well as FEC compliance.

k. For the remainder of 1992 and part of 1993, I served as the Chair of the Libertarian Party of Arizona and was once again involved with candidate recruitment and training for races at all level, including federal.

l. From late 1993 until late 1997, I served again as the National Director of the Libertarian National Committee, and was again responsible for the same broad range of activities as during my first period of duty as the Libertarian Party's top professional manager. During this time I was responsible for an unprecedented growth in national LP membership and revenue and oversaw the creation of the national LP's first software for filing automated FEC reports. Prior to this time all of the national LP's FEC reports had been prepared by hand.

m. After the LP's presidential nomination in 1996, Harry Browne's presidential campaign was run from my office with my close coordination as LNC National Director. As with the Marrou campaign in 1991/92, I was involved with every aspect of a national presidential campaign.

n. During 1997 and 1998, I served as a fundraising contractor for the LNC, and from late 1997 through the 2000 election I was also the campaign manager for Harry Browne's second Libertarian campaign for President. As with the Marrou campaign in 1991/92, I was again responsible for every aspect of the campaign's strategy and execution, including ballot access, media relations, candidate scheduling and travel, relations with state and local party organizations and candidates, volunteer coordination, fundraising via direct mail, telephone solicitation, campaign events, and personal meetings with donors, as well as FEC compliance.

o. At various times, in between paying political jobs, I have also served brief stretches as a member of the LNC.

2. The above work has given me extensive familiarity with campaign management and campaign fundraising, as well as party management and fundraising, including knowledge of donor motivations, campaign and party accounting, and database management, as well as campaign finance regulation and compliance at the local, state, and federal levels. I have designed multitudes of fundraising packages, including direct mail letters, major donor presentations, email appeals, online contribution pages, and all of the "lift pieces," inserts, and response forms that are normally associated with such packages. I also have extensive experience with the design of campaign and party databases and the forms and procedures required to comply with campaign finance regulations. I have overseen the development of both party and campaign finance reporting software, and served as a treasurer or assistant treasurer of federal campaigns. I have raised money by direct mail, over the phone, at events, and by personal meetings with

hundreds of donors. I have experienced first hand the effects that campaign finance laws have on the behavior of volunteers and donors, as well as professional campaign and party staff. My long and varied work experience has given me an understanding of the profound effect campaign finance regulations have on the operations of campaigns and party committees, as well as on the outcome of elections.

3. My political activity is motivated by my desire to effectively express my political values, and to seek representation for those values in the halls of government. I have been unable to accomplish this aim in significant part due to the limitations on political expression and association imposed by the federal campaign finance laws. As detailed herein, these laws serve the interests of incumbent politicians, as well as their allies in the established corporate news media. These laws restrict, trample, violate, and dramatically diminish my ability to speak, print, and broadcast my political preferences, and to freely associate with like-minded people for the same purpose.

4. With the exception of 1980, I have never voted for a candidate who has won political office (Ronald Reagan and other Republicans I voted for won in that year). Throughout all that time, I have considered myself to be virtually un-represented in government. I am not alone in this regard.

Nearly all elected representatives are either self-professed liberals or conservatives, but not all Americans are liberals or conservatives. Indeed, numerous polls and surveys have demonstrated that there may be as many philosophical libertarians as there are philosophical liberals or conservatives in America.

For more than 20 years, the Libertarian Party has conducted surveys at fairs, trade shows, and flea markets

across America. Depending on when and where these surveys were conducted, they have shown that somewhere between 12% and 33% of the populace hold views that can only be described as libertarian. Other surveys by polling organizations such as Gallup and Rasmussen Research have also shown a high degree of libertarian belief in the country. A Gallup poll in January 1996 found that 20% of Americans held libertarian beliefs, while 13% were liberal, 35% conservative, and 20% populist.[50] Other Gallup polls at other times have found libertarian beliefs in 19% and 22% of the populace. An extensive survey by Rasmussen Research, called Portrait of America, conducted on August 23, 2000, found the following breakdown in political beliefs among Americans: 32.1% centrist, 17.2% with views bordering on other categories, 16.3% libertarian, 12.8% liberal, and 7.2% conservative.[51] All of these surveys show a significant libertarian presence in society, and a wider range of belief systems among Americans than are represented in government. In particular, liberals and conservatives, in the form of Democrats and Republicans, seem to be significantly over-represented in government compared with Libertarians. In contrast, there is only one person in Congress who consistently espouses libertarian beliefs (Congressman Ron Paul), no Libertarian Party members in federal office at all, and precious few LP members in state and local office. This disparity, between the broad range of beliefs held by the public and the narrow range of beliefs held by elected office holders, is a strong indication that the distribution of political representation in America is artificially created, rather than the natural outcome of market forces.

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[50] http://www.lp.org/lpn/9606-Gallup.html

[51] http://www.lp.org/lpnews/0010/16percent.html

Some of this artificial distribution can be attributed to the United States' "winner-takes-all" voting system in conjunction with ballot access restrictions on new parties, and district gerrymandering that disenfranchises libertarian voters; however, none of these factors can explain other survey findings indicating that nearly all of America's philosophical libertarians are completely unaware of the Libertarian Party alternative to the Democrats and Republicans. I believe, and will more fully explain below, that the public's ignorance of the Libertarian Party alternative is largely due to the federal campaign finance laws and their counterparts at the state and local levels.

5. The absence of representation for philosophical libertarians in government is matched by a similar absence of libertarian ideas expressed by media businesses. The full range of widely-held political beliefs in America is not expressed by the established corporate news media. Instead, libertarians must endure the media's relentless parroting of the views of the politicians and parties already in power, as well as their promotion of Democratic and Republican office holders and party leaders, to the virtual exclusion of Libertarians and other minor parties and views.

The established corporate news media have rarely given any airing to libertarian ideas or candidates, and have never done so to a sufficient extent to have them properly evaluated by the American public. This has been true even when Libertarian Party candidates have been newsworthy in terms of the criteria the corporate news media apply to liberals and conservatives, Democrats and Republicans. I can provide at least two specific examples.

In 1992, my Libertarian Party candidate for president, Andre Marrou, defeated all of his Democratic and Republican rivals in the Dixville Notch voting that kicks off the New

Hampshire primary Election Day. This victory was the lead news item all across the nation the following morning, but when voters called into TV networks wanting to learn more about Andre Marrou and the Libertarian Party they were repeatedly told that it would be a waste of time to do any additional reporting about Marrou and the LP. The networks argued that the Dixville Notch vote was clearly a fluke. NBC even said this on the air in response to one voter who called in, asking for more coverage of Marrou. Our campaign staff pointed out to the networks that Dixville Notch, because of its small population, had represented a rare opportunity for Libertarians to have their views heard by voters to the same extent as the Democrats and Republicans. Therefore, the Dixville Notch result was indicative of how other voters might respond to LP candidates if the media were to inform the public of who the Libertarians are and what they believe. The established corporate news media rejected this reasonable argument out-of-hand and provided no additional coverage at all.

A second example occurred in 2000. Pat Buchanan was running for president on the Reform Party ticket. He was a national figure who had previously enjoyed great success in Republican primaries. He accepted federal funding. He received extensive coverage from the established corporate news media, while his LP challenger in that year, Harry Browne, received almost none. But despite all of Buchanan's advantages, Buchanan and Browne were virtually tied in the polls throughout the 2000 campaign.[52] Our campaign argued to the media that Browne's equal showing, given his inferior public recognition, funding, and media coverage, would seem to indicate that Browne would find more favor with voters than Buchanan if Browne were to be provided with coverage equal

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[52] http://www.lp.org/press/archive.php?function=view&record=144

to Buchanan's. This sensible argument was made in vain. The news media continued to give attention to the once and future Republican, Pat Buchanan, and to ignore Browne.

These examples are a strong indication that both election results and media coverage are largely artificial, and do not represent the true values, desires, and preferences of millions of American voters. This, too, is a consequence of the federal campaign finance laws, as I will discuss below.

6. If the established corporate news media will not cover libertarian ideas and Libertarian Party candidates, then Libertarians must undertake the burden of making themselves visible entirely through their own efforts. Unfortunately, the law does not permit us to communicate with the public in the same way that the established corporate news media can.

The established corporate news media retain an unrestricted right to raise unlimited amounts of money through a variety of means that are not legally available to political campaigns. The established corporate news media can also spend unlimited amounts giving free publicity to the political causes they favor, attacking those they oppose, and ignoring those they disdain. And they can do (and actually do) all of these things without any legal requirement to report to the government the source of every $200 they take in, or the recipients of their expenditures on expressions of political ideas and preferences. My preferred political ideas, candidates, parties, and campaigns do not enjoy equivalent rights of capital accumulation and expenditure, and are therefore unable to compete for the public's consideration or approval.

Libertarian campaigns are legally prohibited from operating as a press in the same way that the established corporate news media can, and therefore, cannot make up for

the coverage the established corporate news media preferentially confer on our political opponents.

7. Throughout my years of effort, I have tried to live with, and to surmount, the legal obstacles imposed by the federal campaign finance laws. These laws burden my freedom of expression and association as I struggle to compete with media businesses that are exempt from corresponding sets of limits on their freedoms of expression and association.

It is important to understand that campaigns compete with media businesses to gain access to, and influence with, the American public. In particular, the first aim of the campaigns on which I have worked has always been to serve as a press, in every sense of that word, for the purpose of educating the public about libertarian ideas. But the established corporate news media have almost always communicated ideas that were mostly contrary to those my campaigns were trying to express. The competition between Libertarian campaigns and the established corporate news media is real and direct.

The second aim of the campaigns on which I have worked has been to win votes for my candidates. But the established corporate news media, both through acts of omission and commission, have always worked against my candidates. By omitting coverage of Libertarian candidates, the media have sent a message to the public that Libertarians are unworthy of consideration, and by giving extensive coverage to Democrats and Republicans, and by endorsing Democratic and Republican candidates, the media have been able to use their press to do what my press cannot do in the same way because of their broad exemption from campaign finance laws. Again, the competition between Libertarian campaigns and the established corporate news media is real and direct.

Campaigns and media businesses operate in a similar way. Both specialize in communicating with the public. Campaigns and media businesses also have similar capital requirements. Both must begin with sufficient venture capital to rent office space, buy equipment and supplies, pay staff salaries, and communicate with a broad audience, until such time as enough customers/contributors can be found to generate sufficient revenue to operate the business/campaign profitably. But campaigns and media businesses cannot accumulate capital in the same way.

Media businesses can borrow money to meet their capital needs, but campaigns are prohibited by the federal campaign finance regulations from borrowing money, except from banks, and even then only in narrowly constrained ways that make it difficult for minor party campaigns to take advantage of this source of capital. Minor party federal campaigns almost always lack sufficient assets to acquire secured bank loans.

Media businesses can also seek large investments from individuals, but campaigns are legally limited to relatively small contributions of $1,000 per election (and even the higher $2,000 limits under BCRA are totally insignificant compared with the amounts media businesses are legally allowed to raise).

All of these legal inequalities deprive the public of information that campaigns would otherwise provide, in opposition to the competing information provided by the established corporate news media. This distorts the political process.

8. It is a simple fact that the public cannot consider new political ideas, or the candidates who express them, unless they first become aware of them. This is a fundamental and

inescapable truth. But, for ideas and candidates to become known, they must first compete for the time and attention of the public against all the other ideas and candidates clamoring to be heard. It must be understood that I am not talking about equality of outcome in this competition. I am talking about equality of opportunity, and more specifically still, of equality before the law. There can be no equality between campaigns and media businesses when the political expressions of campaigns are heavily regulated while the political expressions of media businesses are almost entirely exempt. The mere opportunity to become known by voters, quite apart from becoming accepted by them, is entirely a function of money. Money, and the various ways money can be accumulated, cannot be separated from speaking, printing, and broadcasting.

So how can we partisan Libertarians give our political preferences an equal opportunity to be heard? Should we be required to have some of our philosophical allies purchase a national television network, a national radio network, a national newspaper chain, and a weekly national news magazine, simply to be able to match the same level of expression that the established corporate news media already enjoy without legal impediment, or that our political opponents already achieve through their close relationship with the established corporate news media? But what if our philosophical allies are not willing or competent to capitalize and operate such media outlets? Is our freedom to speak, print and broadcast the way we want thereby foreclosed? The answer is yes under the current laws, because the comparative competence that partisan Libertarians do have, which is to use campaigns as a press to speak, print, and broadcast expressions of our political preferences, is legally limited by contribution limits and reporting requirements.

Does this then mean that our freedom to speak, print, and broadcast our political beliefs should be limited to non-

profit educational efforts relating only to public policy issues, because such expressions are largely free from the contribution limits and reporting requirements that so severely restrict political campaigns? Certainly our desire to express ourselves is not limited to those kinds of purposes. We also desire to express our preferences for and against candidates and parties in the same way that media businesses can.

I know that there are people with whom we would want to associate in ways that might counteract the similar expressions of our political opponents, and of the established corporate news media. But the ability of our campaigns to associate with others for the purpose of expressing political preferences in competition with media businesses cannot be achieved under the campaign finance laws.

9. The legal inequalities challengers face in their competition with media businesses are matched by similar legal inequalities between challengers and incumbents. These inequalities are many and varied, including the franking privilege, easier ballot access for major party candidates, and gerrymandered districts that protect incumbents. These legal advantages are bad enough, but they are compounded greatly by the advantages conferred upon incumbents by the campaign finance laws. The most obvious such advantage is the incumbent's greater access to sources of funds, as well as the more numerous methods of fundraising that are available to incumbents in comparison with challengers. Major parties also benefit because their Presidential nominating conventions are federally subsidized and candidates for President receive federal funds on a different basis than minor party candidates.

Challengers and minor party candidates rarely benefit from the special interest contribution bundling that funds incumbent candidates. Likewise, political action committees (PACs), which tend to organize around specialized interests,

only rarely fund challengers against incumbents. The reasons for these disparities are simple and obvious. Challengers do not have the same power to help or harm special interests that incumbents have. And Libertarians are especially disadvantaged in that we are philosophically opposed to the expansive and activist state that is the source of special interest government favors. Libertarians have both a moral and constitutional objection to using government power to help or harm any commercial or other special interest, and cannot therefore promise policies that would be attractive to most special interest donors.

In my appeals to major donors for campaign contributions I have often been rejected because the donor was already contributing to incumbents who could help or harm the donor's interests. I have also applied for support from PACs, and been rejected because my candidate was not an incumbent. And no donor or organization has ever been willing to bundle contributions for my candidates. The only effective way to overcome these disparities in funding sources and fundraising methods between challengers and incumbents would be for the challengers to solicit larger contributions from the funding sources they do have, but the legal contribution limits make this impossible.

It is important to notice the parallels. The campaign finance laws not only disadvantage Libertarians and other challengers vis-à-vis the established corporate news media, but vis-à-vis incumbents as well. Worse still, these kinds of disadvantages not only apply to donors who are not seeking to gain special favors from government, they seem to particularly disadvantage those who contribute for purely philosophical reasons. I will discuss this problem in my next point.

10. During two decades of personal experience fundraising for campaigns, including innumerable discussions

with potential donors, I have learned that most potential contributors, and major donors in particular, share similar concerns about the potential results of their contributions. These concerns are expressed in the form of the questions most donors ask of campaigns: "Can you win?" "Will your message be heard?" "Will your message be remembered?" "What will be the lasting impact of my contribution?" Contribution limits and reporting requirements make it almost impossible for third party candidates and other challengers to give potential donors fully satisfying answers to these questions.

Our political system is "winner-takes-all." This reality leads most would-be donors to base their giving decisions on whether candidates can climb from zero support to a plurality or a majority. In addition, even challengers who are only seeking to educate the public, rather than unseat the incumbent, must still demonstrate to donors that their message can effectively compete not only with the incumbent's communications, but also those of the established corporate news media. It does little good to spend money on a message that will be drowned out by other communications, and/or forgotten for lack of sufficient repetition. By way of contrast:

a. An incumbent candidate must only demonstrate to a prospective donor that he or she can retain his or her previous plurality or majority. This is no hurdle at all. It is normally assumed that incumbents can retain the support that got them elected the first time. Re-election rates confirm this supposition.

b. Media businesses that express political ideas can accumulate resources merely by demonstrating the ability to earn a marginal profit on <u>all</u> of their expressions, both political and non-political. They are not burdened by the need to gain a plurality or majority

market-share for their political expressions. A small market-share for political expressions can still be profitable, and/or other forms of communication such as sports and entertainment can even subsidize the media business's political expressions.

The same considerations do not hold true for challengers. Challengers have a much greater burden to demonstrate to potential donors that they can match both the communications of the incumbent, and the media. This usually means that the challenger will actually need more resources than the incumbent.

Worse still, the challenger is also going to have higher fundraising costs than the incumbent. Most challengers have to build donor lists from scratch, an expensive undertaking. It costs less for the incumbent to receive income from bundling and PACs, and to solicit repeat contributions from previous donors, than it does for a challenger to build his or her initial donor base. These considerations tend to hold true even when a challenger is running again after a first or second unsuccessful campaign. Prior electoral losses tend to instill skepticism in previous donors and increase the cost of earning new contributions from them. This also tends to hold true for candidates who are only running for educational purposes. Previous failures to saturate a market breed doubt that a second or third effort will do any better. Overcoming this doubt increases fundraising costs vis-à-vis what incumbents and the media pay to fund their communications.

11. It is very important to understand that contribution limits increase the marginal cost of each donation the challenger raises, more so than for incumbents who have broad and pre-existing sources of revenue. Contribution limits increase marginal fundraising costs by reducing the net effect of every appeal made to a donor who would have contributed

more than the legal limit, if not for the law. As an additional negative result, the increased costs created by contribution limits also increase the risk that the challenger's effort to compete with the communications of the incumbent and the media will fail. If a challenger does not raise the entire amount needed to be competitive, then the effective value of earlier contributions is largely negated. Potential donors tend to recognize this risk and reduce their contributions accordingly – often to zero. By contrast, donations larger than the limit, if the challenger could receive them, would lower the marginal cost of fundraising, shorten the time required to raise the needed amount, and thereby reduce the risk that the effort to gain communications parity would fail. This decreased cost and risk would cause potential donors to increase both their rate of giving and the size of their donations.

How can these difficulties be overcome? I know of only one way: the challenger needs to be able to raise larger amounts from his or her most stalwart supporters. This is impossible because it is illegal under the campaign contribution limits of both FECA and BCRA. The other potential option, of raising more contributions in smaller amounts, is subject to diminishing returns. The acquisition costs for each new contributor tend to rise higher and higher as the donor recruitment effort reaches more people who have fewer areas of agreement with the challenger. The sum spent on donor acquisition over time grows as a percentage of all funds raised. Worse still, earlier donors begin to object to the challenger spending their money simply to raise more money. This growing discontent on the part of earlier donors reduces fundraising efficiency still further by decreasing the number and size of additional gifts from previous donors. Valuable time is also lost as the effort to obtain sufficient small contributions progresses. While the incumbent and the media are busy communicating their messages to the public the challenger is spending time finding new donors.

12. None of the above factors has any appreciable impact on incumbents. Most significantly, the elimination of contribution limits would do little to increase meaningfully incumbents' communications with the electorate. Most of them are already able to saturate their districts with campaign communications. The marginal increases in funding that could come to incumbents with the end of contribution limits would have almost no effect on their ability to communicate with voters.

Former Clinton advisor Dick Morris demonstrated the truth of this in an article published on March 21, 2001 in *The Hill* (a weekly political newspaper). The article was titled, "You Don't Need Soft Money." In this article Morris pointed out that incumbents already spend more than enough to reach every voter as many times as necessary, and that raising more and spending more would not add anything significant to their campaigns. FEC Commissioner Bradley A. Smith has made a similar analysis in Chapter 4 of his book "Unfree Speech." Smith, like Morris, argues that increased funding would help challengers be more competitive, but would confer no additional advantage on incumbents. This is one of the dirty little secrets of campaign finance regulation that those who support such regulations never mention. Contribution limits hurt challengers and protect incumbents. Ending them would help challengers, but not hurt incumbents except insofar as voters could then better evaluate incumbents' views by comparing them to the views of challengers.

Donors either intuitively or explicitly understand most or all of the above factors. The increased risks and costs created by contribution limits lead many donors to forego contributions to challengers, even when they prefer the challenger to the incumbent. The investment seems pointless to the potential donor given the economic realities imposed by the contribution limits. This pernicious effect extends even to

donors who can only afford to give amounts that are less than the maximum contribution limit. They know that their smaller contributions will be less effective if they are not also joined by donations that are larger than the legal limit. Smaller donors therefore tend to give less than they otherwise would in the absence of the contribution limits.

The truth is that, under the contribution limits, most challengers cannot raise enough money to win, or to be heard, or to be remembered, or to have any kind of lasting impact. Thus, many donors who agree with a challenger's message refuse to make contributions that they believe will achieve nothing, while others give reduced amounts merely out of sympathy for the quixotic quest. Still others fail to give out of fear, as I will discuss in my next point.

13. The most reliable sources of income for challengers are those citizens who either dissent from current government policies and/or those who have economic interests that are negatively affected by government activity. Both have incentives to <u>not</u> want their names to appear in the federal campaign finance reports challengers are forced to file.

Dissenters tend to have a greater fear of government power than do citizens who support incumbents. This fear is real even when it is poorly justified. The result tends to be that dissenters are less likely to contribute to challengers they would otherwise support, or that they contribute less than they otherwise would in order to fall below the reporting threshold. Donors have often told me that they would not contribute because they did not want to have their names reported. Many have also told me they were contributing $199 in order to avoid having their names and addresses appear in FEC reports.

Much the same holds true for potential donors who have business interests that are affected by government. Many

of these donors, like the dissenters, fear the government as an institution, and are particularly concerned with the ability of incumbents to harm them through legislation and regulation. I know from many conversations with donors that this concern is real even when it is poorly justified. Many of these potential contributors do not want incumbents to know that they have given money to challengers. Thus, as with the dissenters, they sometimes fail to give at all, or they give less than the reporting threshold, even though they could easily afford to contribute more.

The reporting requirements also create three other problems.

a. Potential Libertarian donors tend to be especially concerned with privacy. Some are merely concerned about their own privacy. Others want to reduce the amount of information the government has about its citizens in general, feeling that such data can serve as the foundation for a police state. Libertarians with privacy concerns are confronted with having to lose part of their privacy if they want to make political contributions to Libertarian candidates who <u>agree</u> with their views on privacy. Many Libertarians resolve this conflict by not making political contributions, or by making donations that are lower than the amount that would trigger inclusion of their personal information in FEC reports. Once again, this distorts the political process.

b. As FEC Commissioner Bradley A. Smith discusses persuasively in Chapter 10 of his book "Unfree Speech," FECA reporting requirements also open political donors to potential intimidation by employers and union leaders.

c. The burdens of disclosure have a greater negative impact on challengers than incumbents. In addition to the fact that contributors to challengers face a greater risk of intimidation from incumbents, employers, and union leaders, there is also the problem that compliance costs represent a larger percentage of challengers' resources than is the case for incumbents. The burden is especially acute for third party presidential campaigns because the reporting requirements are slightly different than for other federal races. Reporting software for the more numerous House and Senate campaigns is readily available, but the market for reporting software for presidential campaigns is so small that it is not profitable for any commercial firm to create such software. This means that presidential campaigns have to design reporting software from scratch, at great expense and difficulty. For Harry Browne's presidential campaign in 2000, I had to employ a person who was expert in databases, programming, accounting, and FEC compliance. Developing all of these talents in one person was extremely expensive. This person was paid at a higher hourly rate than any other person on the campaign, including the campaign manager.

Given the above considerations, it is hard to understand why it is reasonable to compel the public disclosure of campaign receipts, disbursements, and contributor names, addresses, and amounts. This seems to be an excessive intrusion on established First Amendment protections of anonymous speech, given that a voluntary system could be used instead. Candidates could seek to attract votes from those who support disclosure by voluntarily reporting their campaign finances, and voters who believe in such disclosure could refuse to vote for any candidate who does not offer this information to the public. Likewise, those contributors who

want to remain anonymous could refuse to do donate to any candidate who voluntarily discloses contributor information. Those candidates who see a political value in disclosure could even enhance the value of their reports by offering independent audits, something that has not occurred under FECA. Instead of lobbying government to compel disclosure, public interest groups could lobby individual campaigns directly, and publicly criticize those that fail to disclose. This kind of voluntary approach is especially viable since the advent of the Internet. There is no reason for the legal intrusions on the First Amendment imposed by compulsory reporting when voluntary and market-driven alternatives are readily available. There is no compelling state interest in using government force, or the threat of such force, to make campaigns disclose information about contributors.

Unfortunately, the exterminating effect of the reporting requirements and contribution limits extend even to issues of candidate recruitment and volunteer participation, as I will discuss below.

14. The federal campaign finance laws constitute a barrier to entry and a prior restraint that effectively reduces the number of citizens who would otherwise run for public office. I have often failed to recruit people as candidates who would have been ideal for the job, not because they did not want to be candidates, but because:

a. They knew the campaign finance laws would make it impossible for them to raise enough money to do an effective job; and/or

b. They did not want to undergo the extreme burden of complying with the federal campaign finance laws. In addition, potential campaign Treasurers are especially intimidated by the personal liability they would assume

for compliance mistakes, as well as the accompanying penalties that have become even more draconian under BCRA. The new BCRA penalties, which include potential 5-year prison sentences, have made federal campaign activity potentially ruinous to life, family, and career.

It must be understood that the campaign finance laws raise the cost of participating in the political process and thereby reduce both participation and voter choice. In the case of my own efforts, the result is fewer and often inferior candidates to express libertarian ideas to the public. But even those who do agree to participate, either as candidates or as campaign workers, are negatively affected in others ways, as I will discuss in my next point.

15. I have found that the federal campaign finance laws reduce volunteer participation, and cause dissention and a loss of enthusiasm on the part of candidates and campaign workers. These reductions in volunteer effort and enthusiasm are both direct and indirect.

The direct reductions involve volunteers who want to do things like conduct fundraising raffles, or print their own literature, or raise money to advertise presidential campaigns locally, but who cannot do so because of the regulatory red tape. Some of these volunteers are somewhat unsophisticated, and cannot comprehend that the difficulties are imposed by the government, and not because the campaign's managers lack creativity or a concern for volunteer desires. This misunderstanding creates discontent and diminished support for the campaign. Volunteer efforts work best when driven by emotional enthusiasm, but the regulatory burdens imposed by the campaign finance laws thwart creativity and spontaneity, and replace positive emotions with negative feelings. This has been a problem in every campaign on which I have worked.

Worse still, this problem does not apply only to the casual and unsophisticated volunteer. I have also had candidates who have had difficulty understanding why some of their great ideas could not be executed efficiently or at all under the law. Their frustration at our inability to engage in what they have regarded as common sense forms of free expression has often led to a decreased respect for the campaign's staff, and a decreased interest in those campaign activities that are permitted by the law. Even relatively sophisticated candidates and volunteers can misconstrue respect for the law with passivity, a lack of creativity, a "not invented here" mentality, and a desire to control.

There are also indirect negative impacts on volunteer efforts that are much the same as those that cause artificial reductions in financial support. There is less incentive for volunteer activity if the overall effort is constrained by artificially limited resources. Unsophisticated volunteers often find it impossible to understand why a campaign cannot raise more money, or receive more media attention, given that the incumbent is having no trouble doing so. This too leads to dissatisfaction and reduced efforts.

Another source of friction that results in the loss of both volunteer and financial support is that, because the federal campaign finance laws drive up the costs of fundraising, many supporters come to believe that challengers are wasteful of resources – spending too much money just to raise money. But this is a function of the laws and not the relative competence of the campaigns. It isn't reasonable to assume that all challengers are inefficient fundraisers, but all challengers do have fundraising costs that are much higher than those paid by incumbents.

16. In the past it was possible for some of the negative consequences of the federal campaign laws to be somewhat

ameliorated by soft money contributions to party committees in conjunction with coordinated expenditure provisions. But the corrective effect of so-called "soft money" was minor given that the strategic and tactical plans of campaigns and parties do not always coincide, and major donors do not always have the same interest in contributing to a party's "soft money" account that they would have in giving directly to a campaign.

It is important to understand that the primary purpose of most Libertarian campaigns at this stage of the LP's development is not to win elections, but to build the party itself. Most Libertarian Party campaigns seek to serve the same function as the media, a press if you will. They exist primarily to communicate ideas, and only secondarily to win votes. Unfortunately, the BCRA is designed to remove the largest potential source of funding for this kind of idea-oriented communication.

17. The campaign finance laws, and their impositions on the First Amendment, have been justified as necessary to prevent political corruption and the appearance thereof. But it is impossible for me to understand how the campaign finance laws are really directed at corruption. Anti-bribery and coercion laws make sense in this regard, but campaign finance restrictions do not. As long as the Constitution's express limitations on the power of government to confer special favors are ignored, there is no reasonable basis by which special interest contributions can be viewed as corrupt. They are merely the logical result of a constitutional regime that permits the government to favor some interests at the expense of others. It makes no sense to prohibit through the back door what we permit through the front door. Likewise, it is impossible to understand why politicians should be protected from the appearance that their actions are corrupt. Instead, they should have to defend their actions in a free and open public debate. The law should concern itself with discernable facts,

not debatable appearances. But instead, we have campaign finance laws that constrain a free and open debate about the real motives behind the actions of our elected officials. Ironically, these laws particularly impede the expression of another solution to the perceived problem of political corruption – the Libertarian solution.

To understand the Libertarian Party, it is important to realize that the libertarian program is based on the idea of limiting government, and thereby reducing or eliminating its ability to favor special interests over the general interest. We want to communicate to the public the idea that the real problem in government is not the abuse of power, but rather the power to abuse. We want to educate the American people about the Tenth Amendment. We want to inform citizens of our view that this amendment limits the federal government to only those powers and functions that are specifically enumerated in the Constitution. We want to argue that the federal government would have almost no power to favor some citizens over others if this amendment were strictly obeyed -- there would be few government favors to confer, there would be little power to abuse, and real opportunities for corruption would be vanishingly small.

We want to tell citizens that the real solution to perceived government corruption is not more restrictions on citizens, but more restrictions on government itself, and not through the creation of new laws, but through a new adherence to the supreme law of the land. And we want to argue that government power should never be expanded by means of the courts determining that the state has a compelling interest in wielding new power, but rather, that all increases in state power should only be accomplished when the American people themselves agree that such a need exists, and that the need really is so compelling that it warrants the remedy of a constitutional amendment.

But our ability to express these ideas is damaged by campaign finance laws that protect incumbent office holders from effective competition, withhold choices and information from the public, and ultimately serve to ensure that special interests will always have more power than the general interest. We, who have no desire to confer any special favors on anyone, are silenced by and for the benefit of those who do. We Libertarians believe that this is the real source of corruption in government.

If we Libertarians were permitted to compete freely in the political market place, and the voters still rejected our views and our candidates in an election, so be it. It could take us many years to learn how the voters really feel about our ideas, but if we are permitted to conduct free campaigns, at least we will know that we had a fair chance to be heard and to compete, which is all we seek.

REPORT OF WALTER J. OLSON

Subject Matter of Report

1. My name is Walter J. Olson, principal of Walter J. Olson & Associates, and I have been asked to prepare this report summarizing the operating, reporting, filing, and recordkeeping requirements imposed by the Federal Election Campaign Act of 1971, as amended, ("FECA") on committees registered with the Federal Election Commission ("FEC"), including separate segregated funds ("SSFs") and principal campaign committees of candidates for federal office, and the burdens of fulfilling the various requirements so that the overall regulatory scheme governing federal election campaigns that has now been extensively modified by the Bipartisan Campaign Reform Act of 2002 ("BCRA") can be more clearly understood.

* * *

8. In addition to conferences, the FEC tries to educate individuals, whose responsibility it is to comply with the Federal Election Campaign Act of 1971, as amended, and the FEC regulations on behalf of committees, by publishing informational materials (*e.g.*, the Campaign Guides), and by providing a toll-free telephone line to obtain answers to questions about federal campaign finance law, and making its publications and forms available on the FEC web site. Recently, the FEC has offered to respond within 10 business days to questions about its requirements submitted by e-mail. Even though I have worked in this area for years, I have had to call this FEC information line literally scores of times. Not always do the Information Specialists in the FEC's Information Division know the answers, and frequently must call back. Additionally, the Commission has issued more than 1,500 advisory opinions ("AOs") since 1975 (also now available on

the FEC web site), which are written responses to questions regarding the application of the federal campaign finance law to a specific, factual situation. However, in my experience, one does not need to work in this area very long to be confronted with a situation which has never been addressed precisely by the Commission. In such cases, the FEC staff generally suggests that the individual file an advisory opinion request ("AOR") with the Commission. The effort and costs involved in preparing and filing an acceptable AOR with the FEC, and the time that can be taken for a response, generally makes this procedure either not worth the trouble, or of no use as the response would be received too late to be acted upon. In other cases, I have been told that there is no advice available for me, and essentially I would have to act at my peril. * * * Also, Information Specialists in the FEC's Information Division have access to an index of advisory opinions which I do not believe is available to the public.

* * *

Conclusion

116. Over the course of my years in assisting individuals and organizations with federal election campaign filing and reporting matters, I have dealt with virtually all of the forms and requirements referenced above. In my experience, the burden and costs on such individuals and organizations have been significant. Despite my own extensive experience in working in this field, I find it necessary to research constantly — including calling the FEC for advice — questions that arise in the course of attempting to assist my clients. Compliance with the federal election requirements imposes a significant cost and time-consumption burden on individuals and organizations engaged in federal election activities, and exposes them to serious penalties for violation

of an extensive and complex set of operating, reporting, filing, and recordkeeping requirements.

DECLARATION OF CONGRESSMAN RON PAUL

Ron Paul, United States Representative from the 14th Congressional District of the State of Texas, a plaintiff in the above-captioned matter, declares pursuant to 28 U.S.C. Section 1746 as follows:

1. I am Ron Paul, the duly-elected United States Representative from the 14th Congressional District of the State of Texas. I have served the people of the 14th Congressional District in the capacity as a member of the United States House of Representatives for nearly six years, having been first elected to that position in November 1996 and twice re-elected, in November 1998 and November 2000. Currently, I am the Republican nominee standing for re-election as a Member of the United States House of Representatives from the recently-redistricted 14th Congressional District of the State of Texas.

2. In 1976, and then from 1978 to 1984, I served as an elected Member of the House of Representatives representing the people of the 22d Congressional District of the State of Texas. In 1984, I chose not to stand for re-election to my House seat. Instead, I sought the
Republican nomination for United States Senate from the State of Texas, which I did not win. Four years later, in 1988, I was the Libertarian Party candidate for President of the United States, an office which I did not win.

* * *

5. In 1995, prior to my entry into the race for United States Representative from the 14th Congressional District of the State of Texas, I was required by federal law, under pain of civil and criminal penalty and of the threat of the injunctive and contempt powers of the federal judiciary, to file

with the Federal Election Commission ("FEC") an official FEC Form 2, namely, my Statement of Candidacy for the United States House of Representatives seat for the 14th Congressional District of Texas, designating therein my principal campaign committee and any other committee authorized to receive and expend funds on behalf of my candidacy.

* * *

9. As a candidate for election and for re-election as the United States Representative from the 14th Congressional District of the State of Texas, the treasurer of my principal campaign committee and I, as well as my committee's agents, have diligently made every effort to comply with all federal laws, rules and regulations of the Federal Election Campaign Act of 1971, as amended ("FECA"), including (a) all laws, rules and regulations governing the FEC licensing and registration of my candidacies and of my authorized campaign committees; (b) all laws, rules and regulations governing the filing with the FEC of periodic reports, open to the public, of receipts and disbursements of my authorized campaign committees; (c) all laws, rules and regulations limiting the amounts and sources of financial contributions to my campaigns; and (d) all laws, rules and regulations limiting the ways in which my campaigns can spend money.

10. During the period from December 1995 through July 2002, as required by law, the treasurer of my principal campaign committees has filed an aggregate total of 32 reports with the FEC, including year-end reports, quarterly reports, 12-day pre-primary election reports, 12-day pre-general election reports, and 3 0-day post-general election reports. * * *

11. In these reports, which are on file with the FEC and are public information, my authorized campaign committees, as required by federal law, have disclosed the identities, including name, address, occupation, and employer, of all individuals contributing more than $200 in the aggregate during a calendar year to my campaign committees and the identities, including name and address, of all payees receiving more than $200 in the aggregate during a calendar year regarding operating expenditures and certain other disbursements made by the committees in support of my campaigns for election and re-election to the 14th Congressional District House seat.

12. In these reports, the treasurer of my authorized committees, as required by federal law under pain of civil and criminal penalties and under the threat of the injunctive and contempt powers of the federal judiciary, has been required to comply with the source and contribution limits placed upon funds received to expressly advocate my election.

13. Prior to my entry into elective politics, and continuing to the present day, I have learned that most of the major newspapers, magazines, broadcast facilities, and other communication media promote government policies directly contrary to those that I hold. From the time that I reentered politics in 1995, campaigning for the Republican nomination for the 14th Congressional District seat which I now hold, and in each subsequent campaign for re-election, the newspapers in the major media markets in and around my District have always supported my campaign opponents and have consistently promoted big government policies contrary to those that I have devoted a lifetime to support. Consequently, I have been constrained to develop alternative means of communication outside of those available to me as a member of Congress, such as campaign newsletters, direct mail, e-mail, and the Internet, as well as radio and television advertisements

designed to promote my candidacies for election and re-election and, in the process, to promote my policies of free market, sound money, independent sovereignty, and constitutionally-limited government. Because of the current campaign finance laws, however, I must advocate my candidacy and promote my ideas in relation to my candidacy under rules, regulations, and burdens backed up by the threat of civil and criminal penalties and judicial injunctive and contempt powers from which the institutional press — my major competition in the marketplace of ideas related to a federal election campaign — is exempt.

14. The combination of the licensing and reporting requirements, together with the contribution limits imposed upon me and my authorized committees by the FECA in order to promote my election to the United States House of Representatives from the 14th Congressional District of the State of Texas in 1996, 1998,2000, and 2002 has substantially interfered and adversely affect, and in the future will continue to interfere substantially and affect adversely, the communicative activities of myself, and my authorized campaign committee and my supporters during my campaigns, by reducing the quality and quantity of campaign communications designed (a) to promote my election and re-election, and (b) to inform and persuade the people of the 14th Congressional District regarding my positions on the public policy issues relevant to my campaign. I know and attest that, without such requirements and limits, the quality and quantity of such communicative activity would be improved and increased because my authorized campaign committee would then be able: (1) to raise more money from individuals and organizations which have advised me that they would give more money to my campaign but for the limits placed on them by FECA, even as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"); (2) to raise more money from individuals who have limited their giving to $200 or less to my

campaigns because of the public disclosure requirements of the FEC; (3) to expand the range of fundraising events; (4) to receive more assistance from volunteers; and (5) to redirect significant funds otherwise expended to comply with the FEC licensing, recordkeeping and reporting requirements. Such additional fundraising and expansion would enable me and my authorized campaign committee to support additional and higher-quality communications expressly advocating my election and my positions on the issues.

15. The combination of the contributions limitations and the licensing, reporting and expenditure requirements imposed by FECA upon me and my authorized campaign committees in order to promote my election and re-election to the United States House of Representatives from the 14th Congressional District of the State of Texas in the 1996, 1998, 2000, and 2002 election campaigns has substantially interfered with and adversely affected, and in the future will continue to interfere with substantially and affect adversely, my editorial control over the communicative activity promoting my election and re-election, and informing and persuading on the public policy issues related to my campaigns for election and re-election. Such requirements: (a) substantially limit my discretion to raise and expend funds in ways that I believe would more effectively advocate my election and re-election and my positions on public policy issues related to my campaigns for such election and re-election; (b) substantially limit my discretion in the staging of various kinds of campaign events, especially ones designed to raise funds to support my campaigns; (c) substantially limit my discretion to determine the substantive content and technical quality of my communications advocating my election and re-election and my positions on the public policy issues related to my campaigns; and (d) substantially displace my discretion to decide whether to identifl publicly the identities of the financial supporters of my campaigns.

16. The combination of the contribution limitations, soft money limits, campaign coordination policy, and electioneering communication rules and regulations under FECA, as amended by BCRA, that will be imposed upon me and my authorized committee after the November 2002 elections will place me and my authorized committee at further competitive disadvantage with exempt media advocacy, and will impose upon me and my authorized committee additional substantial and adverse interferences with my and my campaign committee's ability to expressly advocate my candidacy for election to federal office in the future and to inform and persuade the voting public on public policy issues related to my campaigns for election to federal office by: (a) adversely impacting on my ability as a federal office holder and candidate for election to federal office to help raise money for organizations that promote my positions on public policy issues; (b) deterring me from promoting my positions on policy issues lest it appear that such promotion is being coordinated with organizations that take like positions on such policy issues; (c) deterring, if not preventing, organizations that promote my positions on public policy issues from broadcasting those positions at the most critical stage of my election campaigns, but at the same time permitting certain exempt entities to promote positions on public policy issues contrary to my own during the same critical stage of my campaigns; and (d) deterring me from working closely with the state and local Republican parties during my campaigns for election to federal office.

17. The increased penalties under FECA, as amended by BCRA, coupled with the existing system of administrative investigations and fines, civil and criminal penalties, and threats of injunctive relief and the exercise of the contempt powers of the courts, will constrain me and my authorized campaign committees (a) with increasingly-burdensome filing and reporting requirements, (b) with an

increasingly-complex and confusing set of administrative rules, regulations and procedures, (c) with a likely prospect of an increase in costly and adverse administrative action by the FEC in response to complaints[53] filed by my political opponents and their supporters with respect to the new rules and regulations spawned by BCRA, and (d) with a greater threat of criminal liability for violation of the rules under the enhanced penalties of BCRA.

18. Overall, the federal licensing and regulatory system governing my campaigns for elective office has, in the past, operated as a prior restraint, having an intimidating effect upon my and my campaign committee's communicative activities promoting my candidacies for election to the 14th Congressional District House seat and my principles and policies to the people of the 14th Congressional District, and, as a consequence of the additional restrictions to be imposed upon me and my campaign committee by BCRA after the November 2002 election, will operate in the future as an even greater prior restraint with an even greater intimidating effect on such communicative activities, by adding more regulations, more forms and more restrictions, to an already overly-burdensome system that already is difficult to understand, necessitating the hiring of additional professional staff and the discontinuance of some lawful activities: just to stay out of trouble with the FEC that can so easily be stirred up by my political opponents.

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53 For example, such complaints can be based merely on articles from newspapers that oppose my candidacy or my principles.

DECLARATION OF THOMAS LIZARDO

* * *

3. The recordkeeping requirements necessitated by the federally-imposed contribution limits and public disclosure rules have created such a serious conflict between the administration of the financial aspect of Ron Paul's campaigns and the conduct of such traditional campaign activities as celebrity rallies, money-raising auctions, and community barbeques, that the campaign committee has been forced to keep such events to a minimum. Additionally, when such events have been held, and attendees have come forward offering contributions to the campaign, many of them are "put off" by the campaign committee's requests for information about their names, addresses, occupations, and employers that is required by law for donors over $200 in the aggregate during a calendar year. Even after being instructed that it is the law, not the committee, that requires such information, some of these people have been upset with the campaign because of these requirements, and I believe that this has hurt both the campaign's fundraising efforts and the campaign's overall image.

4. In each of the election years in which I have served as a political consultant, I have noticed a number of individual donations in the amounts close to, but under, $200. On several occasions I have had opportunity to talk, in confidence, with individuals who have so limited their contributions, and I learned that for a variety of reasons they did not wish their gift to be made public. For example, on one such occasion, a contributor informed me that he did not want his gift disclosed for fear that his wife would find out. I believe that many donors would contribute substantially more than $200 if their contributions were not made public.

5. In each of the election years in which I have served as a political consultant, the Ron Paul campaign has experienced the following challenge and difficulty: because the main media outlets in the five major media markets in the 14th Congressional District opposed Ron Paul's candidacy, the Paul campaign had to develop alternative means -- such as targeted telephone facsimiles, e-mail, radio spots, direct mail, and telephone calls — by which to communicate Ron Paul's message, principles and policies to the public. In contrast to the major media opposition which is exempt from FEC oversight and control, candidate Paul has been — and continues to be — required to raise funds, keep records, and make disclosures to the FEC. Such discriminatory treatment has placed Ron Paul at a competitive disadvantage to his political opponents who have enjoyed the support of the major media in the 14th Congressional District. I know that this competitive disadvantage would be lessened if Ron Paul, like such exempt media in the 14th Congressional District, could raise funds without FEC-imposed limits because a number of donors have indicated to me that they would give more money to the Paul campaigns if they could, and I am certain that such additional funds would enhance the quantity and quality of Ron Paul's campaign communications.

DECLARATION OF ANONYMOUS WITNESS NO. 1

* * *

3. Over the past decade I have contributed the maximum of $1,000 per election to many candidates for federal office, including Ron Paul, in multiple election cycles. For example, I have contributed $1,000 for the primary election and $1,000 in the general election in the same election cycle for Ron Paul in the 1990s. For example, I have made such contributions not only to help elect Ron Paul and others to federal office, but also to support Ron Paul's policy and educational efforts, and the policy and educational efforts of other candidates for federal office, both incumbents and challengers.

4. I have contributed the maximum of $5,000 per year to one federally-registered multi-candidate political committee in more than one year. I have made such contributions not only to the committee's efforts to support candidates, but also to support the policy positions that the committee was advancing through its support of such candidates.

5. I believe that limitations imposed by the Federal Election Campaign Act and the Bipartisan Campaign Reform Act (BCRA) on my right to contribute from my personal funds more than any specified amount to candidates for federal office unfairly and discriminatorily restrict my First Amendment rights and are unconstitutional. I contribute to others so that they can do that which I could not do myself, or do as well, and to supplement what I do myself. As a businessman, I do not have the time to promote aggressively the libertarian ideas and limited government policies to which I am deeply committed. Because of my personality and temperament, I firmly believe that I would not be as persuasive a spokesman for those ideas and policies to persons who are not close acquaintances or

people who are not like minded. Even if I had more available time and native ability, I want to support the efforts of many like-minded people to advance the cause of freedom. By giving money to others, especially candidates for election to federal office, I am deliberately choosing to associate with their efforts, with the common purpose of informing and persuading others to embrace ideas and policies based on the Constitution, and, if the persons I support are elected, furthering those ideas and policies by their actions as government officials.

DECLARATION OF MICHAEL CLOUD

Michael Cloud, a plaintiff in the above-referenced action, pursuant to 28 U.S.C. § 1746, declares the following:

INTRODUCTION

1. I am Michael Cloud. I am a plaintiff in this action in my capacity as an aggrieved citizen of the United States of America and the Commonwealth of Massachusetts. I am eligible to vote in all federal elections, including any election for the office of President , and I am a registered voter in the Commonwealth of Massachusetts. The federal election law wrongly limits my right to participate in elections both as a candidate and as a supporter of candidates by, among other things, restraining me from participating freely in the marketplace of ideas.

2. I am a plaintiff in this action because I am an aggrieved candidate for federal office, being the Libertarian Party's candidate for the United States Senate from the Commonwealth of Massachusetts in the 2002 election that will be held this November. I am the only challenger in this election facing an incumbent member of the Democrat Party, who enjoys not only the advantage of affiliation with his well-funded "major" party whose vast resources are not threatened by complying with federal election laws, but also the benefit of the selective attention of commercial media corporations. My campaign for federal office as the representative of the Libertarian Party is focused on promoting and educating the public about various policy issues and ideas, particularly the need to restore personal responsibility while reducing dependence upon the federal government. My campaign agenda is not merely to win office, but also, to promote the Libertarian Party's philosophy to the public so that others who share this philosophy can be elected to federal office and/or

inspired to work towards instituting Libertarian principles. The pernicious effects of the Federal Election Campaign Act of 1971 ("FECA"), as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA") (collectively "FECA/BCRA"), undermine my candidacy and impinge on my constitutional rights to communicate with the public about my ideas for a limited government that respects the sovereignty of the people. Instead of being able to speak my conscience and to maximize the limited resources at my disposal to get my message out to the public for debate and consideration, the FECA/BCRA dictates the content of what I must say to the public, how I must say it, and when I must say it.

* * *

4. I am a plaintiff in this action because my constitutional right to Freedom of the Press has been, is, and will continue to be, trampled and abridged by FECA/BCRA. * * * The FECA/BCRA steals the Freedom of Press from me and perverts it into a special privilege for the commercial media corporations. Having secured that special privilege, the commercial media corporations are then free, by action and omission, to promote the candidates of their choice and attack the candidates they dislike. Conversely, I risk imprisonment for up to five years if I knowingly violate certain of FECA/BCRA's provisions. (*See* FECA/BCRA, 2 U.S.C. Section 437g(d)). The FECA/BCRA achieves the ignominious distinction of being a law that grants special privileges to a group (*i.e.*, commercial media corporations) that are denied to individuals.

* * *

THE HARM INFLICTED BY THE FECA/BCRA

6. I have been a member of the Libertarian Party for 27 years, and have been active in federal and state elections both as a candidate and as an active supporter of candidates. During approximately the last 11 years, I have personally raised over $8 million for Libertarian candidates and the Libertarian Party. As noted above, I am presently the Libertarian Party's candidate for the United States Senate from the Commonwealth of Massachusetts. Previously, I ran as a Libertarian Party candidate for the United States Senate and the United States House of Representatives. I intend to participate in federal elections in the future as a candidate and/or as an active supporter of a candidate. I have accepted, do accept, and intend to continue to accept campaign contributions. In short, I have an abundance of first-hand experience in dealing with the "real world" impact that the FECA/BCRA causes and will cause to challenger candidates for federal office who, like me, represent a "third party."

7. As a "third party" challenger candidate, I face burdens and restrictions that the "major parties" and their candidates do not, and which make the time and cost burdens imposed by the FECA more regressive, onerous, and discriminatory. The time and costs spent complying with the FECA sap the limited resources available to get my ideas before the public in a campaign. Furthermore, I do not receive the media exposure accorded incumbents or candidates from the "major" parties.

8. The FECA/BCRA is the equivalent of a double-barreled shotgun blast aimed at third-party challenger candidates such as me who advocate change, because it codifies the advantages of incumbency and fosters a "government by media." Rather than creating a "level playing field" for candidates and encouraging free and open debate, the FECA/BCRA protects incumbents by restraining my right to engage in "electioneering communications" and "express

advocacy." The FECA/BCRA also empowers commercial media corporations with special privileges to express views about candidates and issues I cannot, and then immunizes the commercial media corporations from criminal prosecution for making statements about a candidate that could be a felony if my supporters uttered them.

9. To understand how truly harmful the FECA/BCRA is to me, a Libertarian candidate, it is necessary to appreciate how the FECA/BCRA severely exacerbates the difficulties that challengers such as me already face just to participate in a federal election. Some of these problems are addressed in the Report of Perry Willis, as an expert witness for the plaintiffs in this action. I have read, and I agree with, Mr. Willis' Report. As I discuss in this Declaration, my personal experience as a candidate for federal office and as an active supporter of other candidates for federal office (and state office) confirms Mr. Willis' conclusion that the federal campaign finance laws, despite their oft-stated good intentions, do not improve the electoral process, but instead, worsen it by further enhancing the advantages of incumbents and the unchecked power of the established corporate media to make or break the candidate as they see fit.

10. The FECA/BCRA is part of a legislative pattern that continually adds more of what economists refer to as "barriers to entry" for new candidates who seek federal office. Among the major barriers to entry that impact me and other third-party candidates for federal office, and will continue to do so, are (i) having the funds needed to get on the ballot for election, and (ii) having the funds needed to comply with the FECA/BCRA after getting on the ballot for election. Even without the cost of complying with the FECA/BCRA, a campaign for federal office is very expensive. I was co-organizer, fundraiser, and CEO for Libertarian Party candidate Carla Howell's campaign for the United States Senate in 2000.

It cost approximately $60,000 just to qualify her so that her name appeared on the ballot.

* * *

12. The pay and perquisites for a U.S. Senator are enormous. In truth, a challenger must overcome not just the campaign war chest of a U.S. Senator and his superior fund raising advantages; he or she must also overcome the benefits that an incumbent enjoys courtesy of the federal government, which is to say, courtesy of the taxpayer whose assistance is not voluntary, in that the taxpayer may oppose everything that the incumbent stands for. Here are some of the taxpayer subsidies to a U.S. Senator:

- Annual salary of $150,000 for most Senators (majority and minority leaders receive $166,700)
- Tax deduction for living expenses while away from home state
- Health insurance
- Life insurance
- Retirement system
- Administrative and clerical assistance allowance
- Legislative assistance allowance
- Telecommunications equipment and service for Washington, D.C. and home state
- Stationery and other office supplies as well as use of Senate

copying equipment

- Preparation of required official reports, acquisition of mailing lists to be used for official purposes, and the mailing, delivery, and transmittal of matters relating to official business

- Annual expenditure for mass mailings

- Official office expenses incurred for an office in home state other than equipment or furniture

- Expenditures for publications printed or recorded for auditory and visual use, including subscriptions and purchases of books and other publications, and fees to access computer databanks

- Travel expenses for Senator and employees while on official business

- Additional office equipment and related services for Washington, D.C. and home state

- Recording and photographic services and products obtained through the Senate recording and photographic studios

- Other official expenses as a Senator determines are necessary, such as conference fees, expenses for town meetings, and procurement of non-standard equipment, among other expenses

- Franked mail allotment

- Senate interns

- Paper, letterhead, and envelope allowance

- Public document envelope allowance

- Office space in states

- Mobile office space

- Furniture and furnishings in Washington, D.C. and home state offices

- Office equipment in Washington, D.C. and home state offices

According to the Congressional Research Service, in 1999, for U.S. Senators, (i) the administrative and clerical assistance allowance, (2) the legislative assistance allowance, and (3) the office expense allowance combined, ranged from **$1,823,086 to $3,144,999**. Over a six Senate year term, this amounts to between $11-19 million (approximately), without any time or cost whatsoever incurred for fund-raising. CRS Report for Congress, RL30064, Salaries and Allowances: The Congress, and "Salaries and Benefits of U.S. Congress Members," http://www.house.gov/rules/RL30064.pdf (page CRS-5); "Salaries and Benefits of U.S. Congress Members," http://usgovinfo.miningco.com/library/weekly/aa031200a.htm; and "Pay and Perquisites of Members of Congress" http://thecapitol.net/GAQ/payandperqs.htm.

13. In my current campaign against Senator John F. Kerry, I face an incumbent who is in his third term, meaning that he is completing 18 years in office. In his last election in 1996, he spent over $10 million dollars to make himself even better known to the voters of Massachusetts. He receives extensive coverage from the Massachusetts, particularly

Boston, press. He is a favorite guest of many of the national television "news" shows which invite him on the air to give his views on domestic and foreign policy matters of all kinds. When pork barrel spending occurs in Massachusetts, it provides him with more opportunities for lavish press coverage. The cash value to his campaign of this media promotion is enormous.

* * *

Actually, I have little concern about how much money Senator Kerry has to spend. Senator Kerry's name identification and public presence in Massachusetts is so ubiquitous that I doubt it would be noticed if Senator Kerry had an additional $10 million to spend on his election. On the other hand, I care greatly about how much money I have to spend on my campaign to overcome the many advantages that Senator Kerry has before the election even begins. If I had only a fraction of that $10 million to spend on my election, I could reach the type of name identification and presence that would make my candidacy real to the voters of Massachusetts, and give them a real choice.

Senator Kerry can raise money from business PACs due to his Committee assignments, and I do not begrudge him this ability. But I do object when the federal laws that he helped write virtually ensure that he will not have serious campaign opposition for the rest of his life, due to the restrictions that they place on fund raising by challengers such as myself.

Since there is no Republican in this race, Senator Kerry may choose to save substantial money in his campaign, thereby having a war chest to carry over to the next election to cause any potential challenger to think twice before challenging him.

14. The financial and reporting burdens imposed by complying with the FECA strain my already limited resources to the breaking point. The FECA's financial and reporting burdens include (i) the burden to register an authorized campaign committee with the Federal Election Commission ("FEC") (*see* 2 U.S.C. Section 433); (ii) the burden to file periodic reports with the FEC of receipts and disbursements that are then subject to inspection by the public (*see* 2 U.S.C. Section 433); (iii) the burden to adhere to limitations on the amount of individual contributions (*see* 2 U.S.C. Sections 441a, 441d, 441f, and 441g); and (iv) the burden to report the names, addresses and occupations of contributors who give certain amounts (*see* 2 U.S.C. Section 434).

15. The FECA/BCRA denies me financial support from individuals who share my views, but who, for fear of having their support disclosed publicly or violating the FECA, cannot contribute as fully to my campaign as they would otherwise if their privacy could be protected. There are at least 46 contributors to my U.S. Senate campaign that have given the maximum amount permitted by the FECA and who would, but for the limits imposed by the FECA, contribute even more to my campaign. As a seasoned, professional political fundraiser, I estimate that these 46 contributors would donate between $350,000 and $700,000 in net, spendable funds.

16. There are also at least 261 contributors to my campaign who have contributed in amounts below that which triggers the FECA's mandatory contributor disclosure requirements (more than $200 in a calendar year per election), probably so that their anonymity can be maintained. The reasons for maintaining anonymity are sundry, and often range between genuine fear of injury from others to strong personal beliefs that disclosure is inappropriate. Some contributors do not want their identity disclosed because, as a matter of principle, they believe that the government has no right to

know who they support for a particular office. This creates a "catch 22" in that these contributors want to elect me because of my Libertarian commitment to protecting individual privacy, but to do that, they will have to surrender their privacy. As a seasoned political fundraiser, I estimate that these 261-plus individuals would contribute between $100,000 and $300,000. It is incongruous that our system demands that anonymity be maintained when we vote, so that each of us is free to vote for the candidate of our choice without fear of retribution, but affirmatively prohibits anonymity in the campaign process that culminates in the actual voting. I strongly believe that contributors to a campaign are entitled to the same anonymity as voters, not less.

17. Other contributors want their anonymity maintained because they fear reprisals by the government and/or the incumbent party or candidate. Their fear is justified. In 2001, for example, Richard Egan was being considered by President Bush for the appointment as the Ambassador to Ireland. Mr. Egan had previously donated $2,000 to Carla Howell during her campaign for the United States Senate against the incumbent, Edward Kennedy. Senator Kennedy cited to Mr. Egan's donation as a basis for questioning Mr. Egan's fitness to serve as ambassador.

* * *

20. In order to maximize my limited resources and take advantage of economies of scale, I have also worked with other Libertarian Party candidates for state and federal office. For example, Carla Howell is the Libertarian Party candidate for Governor of Massachusetts. We have mailed our respective campaign bumper stickers in one envelope and split the cost of the mailing. We have submitted our respective campaign literature for printing as two parts of one large job to get a more favorable large-scale price, with each of us bearing our

share of the reduced cost. The BCRA's prohibitions on use of "soft money," including prohibiting state and local candidates from spending "soft money" on communications citing federal candidates, and its limitations on coordinated independent expenditures, may make these types of actions, which were borne out of the necessity for thrift, efficiency, and economy, a civil and criminal violation.

21. I want to be free of the mandatory licensing burdens imposed by the FECA/BCRA. I want to be able to campaign for federal office free from the burden of having to create and register an authorized campaign committee with the FEC. I want to be able to campaign for office free from the mandatory burden of filing periodic reports of receipts and disbursements with the FEC. In my current and likely future campaigns, I want to be free from the mandatory limitations upon individual financial contributions. I want to be free from the mandatory burden of having to report the names, addresses, occupations, and employers of donors to my campaign.

22. With such freedom, my resources would be less burdened and I would have a greater ability to get my ideas before the public and to compete more effectively against incumbents and major party opponents.

23. The "second barrel" of the FECA/BCRA "shotgun" is the special privileges and immunities it grants to institutional media. The assumption used to justify granting these special privileges and immunities is that such entities are non-partisan. My experience is that commercial media corporations, for example, are highly partisan and that to presume otherwise is an act of ignorance, folly, or both. The FECA/BCRA fosters a scheme of "government by media" by granting institutional media a special exemption from its provisions.

24. In the past, the media were overtly partisan. Parties operated their own newspapers, for example. Today, commercial media corporations might not be operated directly by the major parties, but they are still just as partisan.

25. I am personally familiar with the power of commercial media corporations to make or break a candidacy. The commercial media corporations do this directly by endorsing a particular candidate. But they have even more insidious ways of making or breaking candidates or campaigns. They choose what to report and what not to report. How to report it and how not to report it. When to report it and when not to report it. Or whether to report it at all. The power to edit is the power to editorialize. This is endorsement by other means.

For example, in my 2002 U.S. Senate campaign against three-term U.S. Senator John Kerry, I am Senator Kerry's only opponent. In the 14 months since I began my campaign for the U.S. Senate, WGBH-TV (PBS), WBZ-TV (CBS), WCVB-TV (ABC), and WHDH-TV (NBC) have refused to cover me or my campaign. Refused to send reporters. Refused to allow me to do in-studio interviews. And, on several occasions, these FCC-licensed television stations have announced during newscasts that Senator John Kerry is UNOPPOSED. Their news departments have treated our campaign workers rudely, refused to discuss the matter, and hung up the phone on us. Their 1984-style "Censorship by Media" has held down my name recognition, held back my campaign for U.S. Senate, driven down my donations from supporters, and suppressed coverage of me by other media, e.g., newspapers and radio stations. Then these television stations claim I have no public support and therefore I am not "newsworthy." It has been said "They break my legs and then tell me they don't cover cripples."

To add insult to injury, these television stations widely reported and eagerly covered a novice Republican who failed to collect the required 10,000 signatures to get on the ballot for U.S. Senate. Further, they covered an embarrassing attempt by another Republican candidate to become the Republican U.S. Senate nominee by trying to persuade 10,000 Republican primary voters to write his name in for U.S. Senate. This "write-in campaign" was done by a Republican who was already on the ballot for Massachusetts Secretary of State.

Republican failure, incompetence, and humiliation are newsworthy in the U.S. Senate race, but a Libertarian success is not. A candidate who has raised $8 million in the last 11 years for Libertarian campaigns is not newsworthy. A candidate who champions small government, individual liberty, and personal responsibility is consigned to Orwell's memory hole. Blacked out. Censored.

In 1997, Ed Rollins was criticized and condemned for suppressing African-American voter turnout for New Jersey Republican gubernatorial candidate Christine Todd Whitman. Mr. Rollins spread around a lot of "walking around money" to African-American preachers and community leaders in New Jersey so that they would discourage and oppose African-American voter turnout. Mr. Rollins' tactic apparently worked. Governor Whitman won re-election by fewer than 27,000 votes. In 2002, WGBH-TV (PBS), WBZ-TV (CBS), WCVB-TV (ABC), and WHDH-TV (NBC) are engaging in a de facto pattern of suppressing voter turnout that is as insidious and destructive to the voting process as the reported actions of Ed Rollins and former Governor Christine Todd Whitman described above.

26. The Libertarian Party is truly a party of ideas and political philosophy that, by choice and necessity, is uniquely integrated with its candidates for federal and state

office. The commercial media's refusal to cover Libertarian candidates is not a neutral act; it is tantamount to opposition.

27. For example, in Massachusetts, the *Boston Globe* strongly favors the Democratic Party. The *Boston Globe* has a long-standing record of endorsing almost exclusively Democratic Party candidates for federal office. By any reasonable definition, the *Boston Globe* is a partisan for the Democratic Party. Very liberal Republicans are acceptable if circumstances dictate. Further, the Boston Globe Group owns hundreds of newspapers in Massachusetts. Just as Wal-Mart headquarters dictates the policies of the Wal-Mart stores, the Boston Globe dictates the coverage and editorial policies of its chain of newspapers.

28. This partisanship is shown directly by its endorsements and commentaries about particular candidates and political parties. It is also manifested indirectly by the lack of attention that mass media outlets give to third party challenger candidates. The reality for my candidacy and of other Libertarians is that the *Boston Globe's* favoring of Democratic Party candidates means that my ideas receive virtually no public exposure in the *Boston Globe*. As a challenger candidate, I am subject to a virtual news blackout by the *Boston Globe*. I have no quarrel *per se* with the *Boston Globe's* right to endorse a particular candidate. I strenuously object, however, to the special privileges and immunities that the FECA/BCRA bestows upon the partisan commercial media corporate outlets such as the *Boston Globe*. The FECA/BCRA allows commercial media corporate outlets such as the *Boston Globe* to make "electioneering communications" under the fiction that its purported news stories, commentaries, and editorials are non-partisan.

29. As part of my candidacy for federal office, and in order to put my ideas and the Libertarian Party's philosophy

before the public for its consideration, I frequently make reference to clearly-identified candidates for federal and state office, (*i.e.*, my opponents in the election), and I often criticize their positions and actions.

30. In addition, I frequently refer to other clearly-identified candidates for federal and state offices whose candidacies I support and those whose candidacies I oppose. I do not expressly advocate voting for or against such candidates; rather, I explain my support or opposition of the particular candidacy based on the candidate's actions and proposals. I fully intend to continue to express my opinions about the actions and positions of clearly-identified candidates for federal and state office in the future as part of my continuing efforts to have the public consider my ideas and the Libertarian Party's philosophy. As a plaintiff in this action, I want to be able to do so without fear of criminal prosecution.

31. I desire to campaign for federal office and to support the campaigns of others free from the editorial control and discriminatory burdens imposed by the FECA/BCRA. In sum, I desire to be free to communicate in an unrestricted manner with the public and to allow the public to judge the extent to which they want to support my candidacy and my ideas without concern that I will be committing a crime for speaking my conscience and, without compromising the privacy of those who support me.

* * *

DECLARATION OF CARLA HOWELL

Carla Howell, a plaintiff in the above-referenced action, declares the following, pursuant to 28 U.S.C. § 1746:

1. I am Carla Howell. I am an adult citizen of the United States of America and the Commonwealth of Massachusetts. I am a registered voter in the Commonwealth of Massachusetts, eligible to vote in all federal elections.

2. I am the Libertarian Party candidate for Governor of the Commonwealth of Massachusetts in the 2002 election that will be held this November. * * *

3. I was the Libertarian Party candidate for election to the United States Senate from the Commonwealth of Massachusetts in the 2000 election. Regardless of the outcome of the 2002 election for governor, I have every intention of remaining active in Massachusetts politics, and of running again for federal office.

4. I have been a member of the Libertarian Party for six years, and in addition to my candidacies for governor and senator, I am now, and have been, an active supporter of other Libertarian Party candidates. I intend to participate in federal and state elections in the future as a candidate and/or as an active supporter of a candidate. I have accepted, do accept, and intend to continue to accept, campaign contributions.
* * *

5. In 2000, as Libertarian Party candidate for election to the United States Senate from the Commonwealth of Massachusetts, I received funds from the national Libertarian Party that made it possible for me to get my name on the ballot. Additionally, I raised approximately $821,362 in funds, received 308,860 votes, and ran nearly even with my

Republican Party opponent. My United States Senate campaign was the #1 "third-party" senatorial campaign in America in 2000 according to measures set by *Campaigns and Elections Magazine*. In my campaign, we were hindered greatly by the onerous financial and time burdens attendant with demonstrating to the FEC our compliance with the FECA, and the law restricted my resources to run a campaign, and regulated my spending.

6. In 2002, as the Libertarian Party's candidate for the Governor of Massachusetts, my campaign's centerpiece is The Small Government Act to End the Income Tax ballot initiative that I and others succeeded in getting on the statewide Massachusetts ballot this November to abolish the state income tax. Just to get the state income tax initiative on the ballot, we had to obtain a total of at least 66,617 verified petition signatures from the citizens of Massachusetts. Recent polls show that about 40 percent of the public supports this initiative and that support is continuing to grow despite almost uniform opposition from the Republican and Democrat parties and the Massachusetts media.

7. In working with other Libertarian Party candidates for state and federal office in the past, I have learned how to maximize my limited resources and take advantage of economies of scale. In my 2000 campaign for the United States Senate, for example, I had to spend approximately $150,577 to pay for television ads and approximately $50,894 in radio ads. I must necessarily conserve my limited funds by various means, including coordinating my campaign efforts with those of other state and federal Libertarian Party candidates. For example, in the current election cycle Michael Cloud, the Libertarian Party candidate for United States Senator from Massachusetts, and I, the Libertarian Party candidate for governor, have mailed out our respective campaign bumper stickers in one envelope and

split the cost of the mailing. We have submitted our respective campaign literature for printing as one large job to get a more favorable large scale price, with each of us bearing our share of the reduced cost. It is my understanding that the BCRA limitations on use of "soft money" donations to political parties may interfere with, or even prohibit outright, such coordinated state and federal candidacy efforts, imposing significant civil and criminal penalties for violating the new rules on the use of soft money by state candidates in what the BCRA defines as federal election activity.

8. My campaign for governor does not receive the media exposure accorded the campaigns of the "major" parties. The commercial media, in Boston, Massachusetts in particular, are not disinterested, objective non-partisan voices of the common good, above the electoral process. Rather, they are active partisans that support their candidates and issues of choice by a variety of means, including favorable news articles about their preferred candidates, and either attacks in news articles, or refusal to provide coverage, about those they oppose. In addition to news stories, they use editorials and commentaries to advance their partisan objectives.

9. The FECA/BCRA is devastating to third-party challenger candidates such as me who advocate change, because it codifies the advantages of incumbency and fosters a "government by media." By exempting media from the FECA/BCRA licensing and regulatory restrictions, the commercial media corporations and other entities are endowed with special privileges to express views about candidates and issues, and are immunized from any threat of penalty or court action for having supported those views with funds unlimited by federal law.

10. To appreciate how perniciously the FECA/BCRA affects me, a Libertarian candidate, it is

necessary to understand how the FECA/BCRA exacerbates the difficulties that challengers such as me already face just to participate in an election. I have read and agree with the Expert Witness Report of Perry Willis that was previously prepared in this action. It discusses some of the difficulties faced by challengers in general, and Libertarian party candidates in particular. My personal experience as a candidate for federal and state office, and as an active supporter of other candidates for federal office and state office, confirms Mr. Willis' conclusion that the federal campaign finance laws do not improve the electoral process. In fact, despite professed intentions of leveling the playing field, the FECA/BCRA worsens the electoral process by further enhancing the advantages of incumbents and the unchecked power of the established corporate media to make or break the candidate as they see fit, and to act as a cartel in control of election communications. (*See* Report of Perry Willis, ¶ 3).

11. For third-party candidates, such as me, commercial media blackouts and/or distortions are an all too-familiar experience. For example, in Massachusetts a cadre of commercial media corporations comprised of the *Boston Globe,* New England Cable News, and four television stations, WGBH, WCVB, WHDH, and WBZ, decided which gubernatorial candidates were invited to the Governor's Debates broadcast live on all major Boston area television stations. Despite the fact that I am the Libertarian Party nominee for governor, the leader of the successful effort to place The Small Government Act to End the Income Tax on the statewide ballot, and despite my strong showing in the 2000 campaign for the United States Senate, the news media has excluded me from participating in at least three debates so far.

12. The mass media decision to exclude me from participation in the debates demonstrates that the media have their own political bias and agenda which does not include

presenting to the public the ideas of Libertarian candidates....
* * *

13. In my 2000 campaign for the United States Senate, it cost approximately $60,000 just to qualify to get my name on the ballot. As a Libertarian challenger, I had to overcome a lack of name recognition in order to secure the minimum of 10,000 verified signatures to be qualified to appear on the ballot. Media exposure, of course, is the best way to get name recognition. In my experience, however, the partisanship of the commercial media corporations makes it very difficult for Libertarian candidates to get the needed exposure, let alone have their message presented in an unbiased way. At the same time, the partisanship of the commercial media corporations in Massachusetts makes it relatively very easy for candidates of the Green Party, a party that is the fraction the size of the Libertarian Party and which has a fraction of the track record for winning votes and supporters as the Libertarian candidates have, to get exposure and to have their message presented in a positive way. This has been demonstrated to such an extreme that it may well have caused the Green Party candidates to legally qualify for the November ballot where they would otherwise have failed. The special privileges and immunities that the FECA/BCRA grants to commercial media organizations serve to further burden and discourage Libertarian candidates from participating in the electoral process. Commercial media organizations already wield an enormous amount of power with regard to how, and even if, they cover a particular candidate. The FECA/BCRA assumes that the commercial media are fonts of impartiality and provides them with special privileges that are denied to me and other individuals. From my experience, I know that assumption is unfounded and prejudicial to my efforts as a candidate.

14. Even news reporting can be and has been used

by the commercial media to advance or hinder a particular candidate. For example, the *Boston Herald* obtained data about donors that I, as a United States Senatorial candidate, was required to disclose to the FEC, and then ran an article about out-of-state donors to my campaign. The Boston Herald "reported" that one (of thousands of such donors) claimed to have also donated funds to David Duke, a former Ku Klux Klan member. As a matter of personal conscience and as a member of the Libertarian Party, the Ku Klux Klan is anathema to me. The salient point, however, is that a purported "news" report based on public donor data was actually an effort to smear me by linking me to David Duke, in what was no doubt alleged to be a "news story" so that it would be exempt under the FEC's rules.

15. This type of misuse of public donor data underscores the harmful effect of the type of mandatory reporting and disclosure requirements in the FECA/BCRA. I am categorically opposed to compelling donor disclosures under the FECA/BCRA, not only because such information can be, and has been, misused, but also because it invades the privacy of the donor and discourages individuals from participating in campaigns. The FECA's mandatory disclosure donor requirements caused me to receive less financial support during my 2000 campaign for the United States Senate than I otherwise would have received. This resulted in me having less money to spend than I otherwise would have had. There were approximately 52 contributors to my campaign that gave the maximum amount permitted by the FECA. At least 30 of these donors were likely to have contributed even more to my campaign but for the limits imposed by the FECA.

16. Similarly, there were many contributors who shared my views, but who, for fear of having their support disclosed publicly or violating the FECA, did not contribute as fully to my campaign as they would otherwise if their privacy

could be protected. * * *

17. The FECA wrongly made, and continues to make, the surrender of privacy the price for providing political support beyond an arbitrary level. There is an inherent illogic in the way that the federal election laws deal with anonymity. When I vote, I am guaranteed anonymity. This enables me to vote my conscience without fear of retribution. Inexplicably, however, the FECA/BCRA expressly prohibits anonymity in the campaign process. It is my firm belief that contributors to a campaign are entitled to the same anonymity as voters, not less.

18. Other contributors to my campaign wanted their anonymity maintained because they feared reprisals by the entrenched major parties. A shocking example of this occurred last year, and involved Richard Egan, who now serves as the Ambassador to Ireland. Mr. Egan had previously donated $2,000 to my campaign for the United States Senate against the incumbent, Edward Kennedy. Incredibly — although perhaps not unexpectedly — during Senate consideration of his nomination, Senator Kennedy (D-MA) cited Mr. Egan's donation to my campaign as a basis for questioning Mr. Egan's fitness to serve as an ambassador. It is no wonder that persons supporting candidates think twice before giving money in a way that is revealed to the public.

19. Other donors restricted their donations to my campaign to maintain their anonymity so that the government would not know of their support for my Libertarian positions on issues such as taxation, so-called gun control, and legalization of drugs, where powerful government agencies like the IRS, BATF, and DEA, are perceived as taking a dim view of those who question their activities, and who have broad discretion to investigate their political adversaries, and the reputation of doing so.

20. Thus, the FECA/BCRA continues to add barriers to entry for new candidates for federal office. The financial and reporting burdens imposed by the FECA/BCRA strain my already limited resources to the breaking point.
* * *

21. The provisions in BCRA have, and will continue to have, a similarly debilitating impact on me and other third-party candidates. As stated in paragraph 5 above, I received funds from the national Libertarian Party during my 2000 campaign for the Senate that allowed me to get on the ballot. That financial assistance was crucial. Under the BCRA (*see* Section 101(a)), however, that type of assistance may be outlawed or practically impossible pursuant to the BCRA's prohibition against national party committees from soliciting, receiving, or directing "soft money."

* * *

23. I intend to continue to express my opinions about the actions and positions of clearly-identified candidates for federal office in the future as part of my continuing efforts to have the public consider my ideas and the Libertarian Party's philosophy. I want to be free of the mandatory licensing burdens imposed by the FECA/BCRA. I want to be free from the mandatory limitations upon individual financial contributions. I want to be free from the mandatory burden of having to report the names, addresses and occupations of donors to my campaign. I want to be free to campaign for federal office, and to support the campaigns of others, free from the editorial control and discriminatory burdens imposed by the FECA/BCRA. In sum, I want to be free to communicate in an unrestricted manner with the public and to allow the public to judge the extent to which they want to support my candidacy and my ideas without concern that I will be committing a crime for speaking my conscience, and without

compromising the privacy of those who support me.

DECLARATION OF LAWRENCE D. PRATT, ON BEHALF OF GUN OWNERS OF AMERICA, INC. AND GUN OWNERS OF AMERICA POLITICAL VICTORY FUND

* * *

18. Among GOAPVF's complaints in this litigation is the restriction on the maximum annual contribution — $5,000 — that it can receive from any one individual or other non-party political committee, which is also the maximum amount that GOAPVF can itself contribute to any candidate or candidate's committee per election. These restrictions have injured GOAPVF in the past — both with respect to amounts it could have received from individuals but for the restriction as well as with respect to amounts that it would have contributed to certain candidates but for the restriction — and they threaten to do so in the future as well unless they are removed. In addition to the fact that such restrictions arbitrarily limit GOAPVF's activities in supporting or opposing federal candidates, they unfairly discriminate against GOAPVF and other non-party political committees, whose annual contribution limits were not raised or indexed by BCRA, as opposed to the raising and indexing of contribution limits for individuals and party committees as set forth in Section 301 of the BCRA.

19. I believe that the contribution limits imposed by BCRA/FECA on political committees such as GOAPVF, including restricting the maximum contribution that may be donated to GOAPVF, as well as the maximum contribution that GOAPVF may make to the candidate(s) of its choice — which limits are not imposed upon the news media — are discriminatory and deprive GOAPVF of its rights under the First Amendment to the United States Constitution, including impeding GOAPVF from freely and effectively engaging in its

First Amendment activities relative to both express advocacy. As GOAPVF's FEC reports clearly reveal, for example, many individuals in the past have donated the maximum $5,000 contribution to GOAPVF, and I can attest that some of those contributors would have donated more to GOAPVF if they had not been restricted by the FECA as to how much they could have contributed. Similarly, as GOAPVF's FEC reports clearly reveal, in the past GOAPVF has donated the maximum $5,000 contribution to certain candidates, and I can attest that GOAPVF, in the past, would have contributed more than the $5,000 limit imposed by 2 U.S.C. Section 441a(a)(2) if such contribution limits did not exist, and I believe that GOAPVF would function more effectively if such contribution limits did not exist.

DECLARATION OF MICHAEL BOOS, ON BEHALF OF PLAINTIFFS CITIZENS UNITED AND CITIZENS UNITED POLITICAL VICTORY FUND

* * *

13. Among CUPVF's complaints in this litigation is the restriction on the maximum annual contribution — $5,000 — that it can receive from any one individual or other non-party political committee, which is also the maximum amount that CUPVF can itself contribute to any candidate or candidate's committee. These restrictions have injured CUPVF in the past — both with respect to amounts it could have received from individuals but for the restriction as well as with respect to amounts that it would have contributed to certain candidates but for the restriction — and they threaten to do so in the future as well unless they are removed. In addition to the fact that such restrictions arbitrarily limit CUPVF's activities in supporting or opposing federal candidates, they unfairly discriminate against CUPVF and other non-party political committees, whose annual contribution limits were not raised or indexed by BCRA, as opposed to the raising and indexing of contribution limits for individuals and party committees as set forth in section 301 of the BCRA.

14. I believe that the contribution limits imposed by BCRA/FECA on political committees such as CUPVF, including restricting the maximum contribution that may be donated to CUPVF, as well as the maximum contribution that CUPVF may make to the candidate(s) of its choice — which limits are not imposed upon the news media — are discriminatory and deprive CUPVF of its rights under the First Amendment to the U.S. Constitution, including impeding CUPVF from freely and effectively engaging in its First Amendment activities. I believe that individuals who in the

past donated the maximum $5,000 contribution to CUPVF would have donated more to CUPVF if they had not been restricted by the FECA as to how much they could have contributed. Similarly, as CUPVF's FEC reports clearly reveal, in the past CUPVF has donated the maximum $5,000 contribution to certain candidates, and I can attest that CUPVF, in the past, would have contributed more than the $5,000 limit imposed by 2 U.S.C. § 441a.(a)(2) if such contribution limits did not exist, and I believe that CUPVF would function more effectively if such contribution limits did not exist.

PROPOSED FINDINGS OF FACT OF PLAINTIFFS IN CIVIL ACTION NO. 02-CV-781

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12. Congressman Paul, in addition to his own activities as a voter and contributor to other organizations and candidates, conducts a number of press activities as a candidate for federal office. Following the dictates of FECA, he has a FEC-registered campaign committee. He and his campaign committee issue campaign newsletters and communicate with the public by means of newsletters, direct mail, e-mail, targeted telephone facsimiles, telephone calls, and the Internet, as well as radio and television advertisements, to promote his candidacy for federal office and his policies of free market, sound money, independent sovereignty, and constitutionally-limited government. Paul Decl. ¶ 13; Lizardo Decl. ¶ 5. The FECA in the past and present, and the BCRA/FECA in the future, has interfered, does interfere, and will interfere with Congressman Paul's free press activities by reducing the quality and quantity of these communications. Paul Decl. ¶ 14; Lizardo Decl. ¶ 5; Elam Decl. ¶¶ 6-7. But for the BCRA/FECA, Congressman Paul would be able to raise more money from individuals and organizations for communicative activities, as well as expand the range of fundraising events, receive more assistance from volunteers, and redirect resources expended to comply with FEC licensing, record keeping, and reporting requirements. Paul Decl. ¶ 14; Elam Decl. ¶¶ 4-5, 7, 10; Anon. Wit. No. 1 Decl. ¶¶ 7-9; Anon. Wit. No. 2 Decl. ¶¶ 6-8. * * * Such restrictions, controls and prohibitions are part of the federal campaign regulatory system that operates as a prior restraint on Congressman Paul's campaigns for federal elective office and that has an intimidating effect on Congressman Paul's communicative, press activities in the political marketplace. Paul Decl. ¶¶ 15-18; Lizardo Decl. ¶¶ 5-6; Elam Decl. ¶¶ 10-11.

13. Plaintiffs Howell and Cloud also engage in press activities similar to those engaged in by Congressman Paul, both as citizens and voters, and as candidates for federal office.... * * * In fact, as 2002 state and federal Libertarian Party candidates, respectively, Ms. Howell and Mr. Cloud coordinated certain campaign activities with one another in the 2002 federal election cycle, which would be prohibited by BCRA's "soft money" rules. Howell Decl. ¶ 7; Cloud Decl. ¶ 20. The press campaign activities of both Ms. Howell and Mr. Cloud in the past have been restrained, economically challenged, and adversely impacted by the FECA laws limiting campaign contributions and requiring registration, reporting, and disclosure, which will be exacerbated under BCRA/FECA. Howell Decl. ¶¶ 7, 9, 15-22; Cloud Decl. ¶¶ 2, 4, 7-9, 14-17, 19-21. * * * Like Congressman Paul, Ms. Howell's and Mr. Cloud's press activities are impacted by the discriminatory effects of the FECA with respect to the institutional media, if not to a much higher degree because of the Massachusetts candidates' involvement with the Libertarian Party, which is a "third party." *Compare* Paul Decl. ¶¶ 13, 16 *with* Howell Decl. ¶¶ 8-12 *and* Cloud Decl. ¶¶ 7-9, 25-28. Additionally, a primary objective of Libertarian campaigns in general is to educate the public about small government and other aspects of Libertarian Philosophy. Willis Exp. Rep. ¶¶ 7-8. The existence of the Libertarian Party and any details of the Party's platform is almost universally ignored by the corporate mass media. Cloud Decl. ¶¶ 24-28; Howell Decl. ¶¶ 11-14, Willis Exp. Rep. ¶¶ 7-9.

14. GOA, RCR and CU, by their respective undertakings, engage in press activities. Each of them has as a principal function the dissemination of information concerning rights secured under the United States Constitution and other important legislative and policy issues. Pratt Decl. ¶ 3; Babka Decl. ¶ 3; Bossie Decl. ¶ 3. GOA and CU each spends significant funds for communications on such issues

during periods, *inter alia*, just prior to federal primary and general federal elections, utilizing broadcast, cable, and satellite facilities. Pratt Decl. ¶ 3; Bossie Decl. ¶ 3. GOA and CU each also communicates with the public by means of mailed and telefaxed letters, messages and articles on its Internet web site, audio tapes, videotapes, and radio and television broadcasts to the public. Pratt Decl. ¶ 5; Bossie Decl. ¶ 5. The press activities of both GOA and CU include engaging in issue advocacy, including communications which will constitute "electioneering communications" as that term is defined by BCRA. The provisions of BCRA which restrict such communications will prevent GOA and CU from engaging in such press activities within 30 days of a primary federal election and 60 days of a general federal election. Pratt Decl. ¶¶ 7, 9; Bossie Decl. ¶ 7. RCR, which was formed in 2000, does not have the many years of press activities that GOA and CU have, but it regularly distributes educational communications by e-mail to a subscriber list of 15,000; it also has engaged in developing communications to the public by radio broadcast which would constitute "electioneering communications" as defined by BCRA. Babka Decl. ¶ 4. Future "electioneering communications" are planned utilizing various media, including radio broadcasting. Such communications would include "targeted communications" as defined by BCRA. Babka Decl. ¶ 7. * * *

15. * * * [T]he press activities of GOA, RCR, and CU are negatively impacted by BCRA/FECA with respect to their working relationships with federal officeholders. For example, both GOA and CU solicit funds through direct mail endorsed by Members of Congress who support the goals of those organizations. Pratt Decl. ¶ 10; Bossie Decl. ¶ 9. RCR has not yet reached that stage of its development, but would like to engage in such communications in the future. Babka Decl. ¶ 9. BCRA/FECA would effectively prohibit such communications, and thus would substantially interfere with

the press activities of GOA, RCR, and CU in this way as well. Even if these plaintiffs were able to engage in such communications in the future, by adopting separate funds that received no corporate contributions and using those funds exclusively to pay for electioneering communications, their press activities would be substantially burdened thereby, including the increased record keeping and reporting requirements with respect to electioneering communications under BCRA/FECA. Pratt Decl. ¶ 7; Bossie Decl. ¶ 5 (p. 5).

16. Plaintiffs GOA and CU, GOAPVF and CUPVF, as political committees, engage in press activities which are severely burdened and restricted by BCRA/FECA. Such burdens and restrictions include the discriminatory registration, reporting, and disclosure requirements mandated by those laws, as well as the discriminatory contribution limits upon political committees and donors to political committees. Pratt Decl. ¶¶ 13, 16-19; Boos Decl. ¶¶ 8, 11-14. *See* Olson Exp. Rep. ¶¶ 17-61. * * *

17. BCRA/FECA subjects the Paul Plaintiffs' press activities to a system of federal licensure. Plaintiffs Paul, Cloud, and Howell, who have been federal candidates, have been required to file a "statement of organization" (signed by a treasurer who assumes unlimited personal liability for legal compliance of the principal campaign committee) with the FEC (or the Secretary of the Senate regarding Senate candidates) before the individual or any committee established by the individual can expend more than $5,000 on "campaign activities," including publishing communications that expressly advocate the individual's election to federal office. Paul Decl. ¶ 14; Cloud Decl. ¶ 14. *See* Olson Exp. Rep. ¶¶ 16, 67, 73.

18. BCRA/FECA imposes economically burdensome regulations upon federal candidates and their committees. * * * For example, plaintiff Cloud estimated that his 2002

campaign for Senate would have received between $100,000 and $300,000 in additional contributions from at least 261 contributors who would have donated more, but did not do so because any contributions over $200 in the aggregate in a calendar year from an individual would have required that his or her identity be disclosed in filed reports. Cloud Decl. ¶¶ 14, 16. There is other substantial evidence that this reporting/disclosure requirement interferes with plaintiffs' press activities by restricting the funds that would otherwise be available for their federal candidacies. *E.g.*, Paul Decl. ¶ 14; Lizardo Decl. ¶¶ 3-4; Anon. Wit. No. 2 Decl. ¶ 8; Willis Exp. Rep. ¶ 13. This burden is discriminatory because it is not imposed on other elements of the press, such as the institutional media. Paul Decl. ¶ 13; Lizardo Decl. ¶ 5; Willis Exp. Rep. ¶ 6.

19. BCRA/FECA imposes additional economically burdensome regulations upon federal candidates and their committees. BCRA/FECA would limit contributions to candidate committees to $2,000 per election. Willis Exp. Rep. ¶ 7. This regulatory burden limits the funds available to federal candidates. Paul Decl. ¶ 14; Cloud Decl. ¶ 15; Willis Exp. Rep. ¶ 7. Plaintiff Cloud estimates that the limitation of $1,000 prior to BCRA cost his campaign committee between $350,000 and $700,000 in net contributions from at least 46 donors. Cloud Decl. ¶ 15. This discriminatory burden is not imposed on other elements of the press, such as the institutional media, which are permitted to editorialize, endorse, and report as they see fit. Paul Decl. ¶ 13; Willis Exp. Rep. ¶ 7; Lizardo Decl. ¶ 5. Such discrimination enhances the role and influence of institutional media corporations in the electoral process. Cloud Decl. ¶¶ 8-9; Miller Exp. Rep. at 19.

20. BCRA/FECA also imposes economically burdensome regulations upon Section 501(c)(4) organizations, including plaintiffs GOA, CU, and RCR, and the connected

separate segregated funds ("SSFs") of GOA and CU. * * * Pratt Decl. ¶¶ 12-13; Boos Decl. ¶¶ 4-5. *See* Olson Exp. Rep. ¶¶ 19, 22. No multicandidate SSF, including plaintiffs GOAPVF and CUPVF, may receive contributions in excess of $5,000 per year from an individual. Pratt Decl. ¶¶ 12, 18; Boos Decl. ¶ 13. GOAPVF, CUPVF, and other political committees supporting or opposing federal candidates also are required to file periodic reports with the FEC regarding their financial activities. Pratt Decl. ¶ 13; Boos Decl. ¶ 11; Olson Exp. Rep. ¶¶ 11, 17. GOAPVF, CUPVF, and other political committees registered with the FEC are further required to report the name, address, employer, and occupation of each contributor donating more than $200 in a calendar year. Pratt Decl. ¶ 17; Boos Decl. ¶ 13. This burden on plaintiffs' press activities is not imposed on other elements of the press, such as the institutional media, and is discriminatory. Pratt Decl. ¶ 19; Boos Decl. ¶ 14. The reporting burden can be 20 percent or more of an SSF's annual receipts. Boos Decl. ¶ 14.

* * *

23. Plaintiffs Paul, Cloud, and Howell, as candidates for federal and state office, have engaged in, and desire to continue to engage in, joint press activities between state and federal candidates. Paul Decl. ¶ 16; Cloud Decl. ¶ 20; Howell Decl. ¶ 7. As members of the Libertarian Party, plaintiffs Cloud and Howell have found it a necessity to run joint press activities as federal and state candidates, and to be able to refer to other candidates, both state and federal, in communicating their ideas and political philosophy during their campaigns. Cloud Decl. ¶¶ 20, 26, 29-30. Section 101(a) of Title I of BCRA places significant barriers in the way of continuing such cooperative press activities between federal and state candidates, and in doing so, substantially and adversely impacts on the power of plaintiffs Cloud, Howell, and Paul to exercise editorial control over their press activities in relation

to their respective campaigns for federal and state office.

* * *

24. BCRA/FECA would subject the press activities of Plaintiffs to editorial control by effectively prohibiting plaintiffs GOA, RCR, and CU — organizations receiving corporate contributions — from engaging in "electioneering communications." These organizations have engaged in broadcasting communications in the past which would have or could have qualified as electioneering communications under BCRA, and desire to broadcast electioneering communications in the future. Pratt Decl. ¶¶ 7, 9; Bossie Decl. ¶ 7; Babka Decl. ¶¶ 4, 7, 9. * * *

25. The reporting requirements of BCRA/FECA are voluminous and extremely burdensome. Olson Exp. Rep. ¶¶ 7-15, 17-60, 116; Miller Exp. Rep. at 23; Pratt Decl. ¶¶ 13-16; Boos Decl. ¶¶ 7-11, Cloud Decl.¶ 14; Howell Decl. ¶ 20.

26. To the extent that GOA, RCR, and CU were permitted to make electioneering communications, they, like GOAPVF and CUPVF, would be required to comply with additional recordkeeping and reporting requirements if they spend $10,000 or more per year in "electioneering communications." Any significant broadcast television or radio activity will easily meet this threshold. Pratt Decl. ¶ 5.

* * *

37. BCRA/FECA subjects the press activities of the Paul Plaintiffs to editorial control by limiting the financial resources available to candidates. Federal candidates are now limited to contributions of $2,000 per election from individuals, reducing the quantity and quality of the press activities of candidates. Paul Decl. ¶¶ 14-15; Cloud Decl. ¶¶

21-22; Howell Decl. ¶¶ 15, 23; Lizardo Decl. ¶ 5; Elam Decl. ¶ 5; Miller Exp. Rep. at 15-17. Individuals would also continue to be prohibited from contributing as much as they desire to facilitate the spread of ideas and policies which they support. Anon. Wit. No. 1 Decl. ¶¶ 5, 8.

38. Limits on contributions disproportionately constrain challengers more than incumbents and thereby benefit incumbents, in part because the marginal gain in votes per dollar spent is substantially greater for challengers. Miller Exp. Rep. at 16-17; Willis Exp. Rep. ¶ 11. It is in the interest of incumbents to limit contributions, and therefore spending, because they already tend to be well known, while challengers must raise substantial sums of money simply to obtain basic name recognition. Miller Exp. Rep. at 16-18. Contribution limits increase the marginal cost of each donation received by candidates by reducing the net effect of every appeal made to each donor who might have contributed more in the absence of the legal limitation. This increase in fund raising costs has less effect on incumbents, who have broad-based pre-existing sources of financing. The spending increases that would likely follow an increase in, or elimination of, individual contribution limits would not increase the communicative activity of incumbents, because they are already able to saturate their districts with communications. Thus, contribution limits serve only to limit communications by challengers. Willis Exp. Rep. ¶¶ 10-12. With contribution limits in place, most challengers cannot raise enough money to win, to be remembered, to be heard, or even to have any kind of lasting impact. Willis Exp. Rep. ¶ 12.

39. Plaintiff Cloud received donations in the maximum amount allowed by FECA from 46 contributors in his recent Senate campaign. Cloud estimates that in the absence of BCRA/FECA's limits, these donors would have been willing to donate between $350,000 and $700,000. Cloud Decl. ¶ 15.

Plaintiff Howell received donations in the maximum amount allowed by FECA from 52 contributors. She estimates that at least 30 of these donors would have contributed more in the absence of limits. Howell Decl. ¶ 15. Experienced fund-raisers regularly encounter donors who would be willing to donate amounts greater than $1,000, or $2,000, if there were no such limitations. Paul Decl. ¶ 14; Elam Decl. ¶ 5. Similarly, political action committees ("PAC") fundraisers often encounter individuals who would like to donate amounts greater than $5,000, but are unable to due to BCRA/FECA's limitations. Pratt Decl. ¶ 19.

* * *

41. BCRA/FECA also subjects the press activities of the Paul Plaintiffs to editorial control by limiting the financial resources available to candidates in another way. Federal candidates are limited to contributions of $5,000 per election from multicandidate SSFs, reducing the quantity and quality of political speech by candidates. Pratt Decl. ¶¶ 12, 18-19; Boos Decl. ¶14.

42. Additionally, BCRA/FECA would subject the press activities of the Paul Plaintiffs to editorial control by limiting the financial resources available to SSFs. Despite raising certain of the individual contribution limits in federal campaigns, SSFs remain limited to contributions of $5,000 per year from individuals, reducing the quantity and quality of political speech by plaintiffs GOAPVF and CUPVF, which are severely limited with respect to their ability to raise funds in support of their own press activities, as well as their speech for or against federal candidates. Pratt Decl. ¶¶ 18-19; Boos Decl. ¶¶ 5, 12; Howell Decl. ¶¶ 15, 23; Lizardo Decl. ¶ 5; Olson Exp. Rep. ¶ 39. Individuals would also continue to be prohibited from contributing as much as they desire to facilitate the spread of ideas and policies which they support. Anon. Wit. No. 1

Decl. ¶¶ 4, 9.

43. Reporting requirements reduce the funds contributed to campaigns because certain contributors, for various reasons, do not want to have their donations revealed to the public. Certain donors are concerned about retribution from incumbents for donations to challengers. Others, fear business or personal consequences of such revelations. Still others object on philosophical grounds to having personal information collected and published. Willis Exp. Rep. ¶¶ 13; Lizardo Decl. ¶¶ 3-4; Elam Decl.¶ 4, Anon. Wit. No. 1 Decl. ¶ 6; Anon. Wit. No. 2 Decl. ¶ 3; Cloud Decl. ¶¶ 16; Howell Decl. ¶¶ 15-16. There is little doubt that the fears of retribution or other adverse consequences are well-founded. This rational basis for fear of retribution from incumbents for donations to challengers' campaigns is illustrated by Senator Edward Kennedy's challenge to the confirmation of Richard Egan an Ambassador to Ireland, citing Mr. Egan's donation to the campaign of Carla Howell against Senator Kennedy as his basis for objection. Cloud Decl. ¶ 17; Howell Decl. ¶ 18. The estimated loss to plaintiff Cloud's senate campaign due to donors seeking to avoid having donations disclosed is between $100,000 and $300,000. Cloud Decl. ¶ 16.

44. In addition to limiting donations to candidates, the reporting requirements of BCRA/FECA discourage candidate entry into the political process. This is due to both the fact that these campaign finance laws make it virtually impossible to raise sufficient funds to compete and the extreme burden involved in complying with the reporting requirements, together with potential liability for even unintentional violations. Willis Exp. Rep. ¶¶ 14, 22.

45. Similar reporting requirements are not imposed on corporate mass media. Willis Exp. Rep. ¶ 9.

46. FECA, as amended by BCRA, clearly discriminates between distinct elements of the press as defined under the First Amendment. Institutional media corporations are exempt from funding limitations placed on candidates and candidate committees. Paul Decl. ¶ 16; Willis Exp. Rep. ¶¶ 6-7. These institutional media corporations remain intensely partisan and active participants in the electoral process. Paul Decl. ¶ 13; Howell Decl. ¶¶ 8-14; Cloud Decl. ¶¶ 23-28; Willis Exp. Rep. ¶ 5-7. BCRA/FECA's limitations on funding to candidates enhances the voice and influence of the institutional media corporations. Miller Exp. Rep. at 19. This discrimination also operates to benefit most incumbents. Willis Exp. Rep. ¶ 9, 10; Miller Exp. Rep. at 19.

47. FECA, as amended by BCRA, also clearly discriminates between distinct elements of the press in other ways. Institutional media corporations are exempt from reporting requirements placed on candidates and candidate committees. Paul Decl. ¶ 16; Willis Exp. Rep. ¶¶ 6, 8; Cloud Decl. ¶ 28. These institutional media corporations remain intensely partisan and active participants in the electoral process. Paul Decl. ¶ 13; Howell Decl. ¶¶ 8-14; Cloud Decl. ¶¶ 23-28; Willis Exp. Rep. ¶¶ 5-7. BCRA/FECA creates barriers to entry by non-incumbents into the electoral process. Cloud Decl. ¶ 10; Willis Exp. Rep. ¶ 14. For example, incumbents benefit from the contribution limitations. Cloud Decl. ¶¶ 10-13; Howell Decl. ¶¶ 4-7 and 15-20; Miller Exp. Rep. at 16-18. Incumbents also benefit from the discriminatory standards and impacts of the limitations on personal use of campaign funds. Howell Decl. ¶ 22; Olson Exp. Rep. ¶¶ 106-112.

48. Additionally, FECA, as amended by BCRA, discriminates between distinct elements of the press by limiting SSFs to contributions of $5,000 per year from individuals. This also reduces the quantity and quality of the press activities

of the Paul Plaintiffs. Pratt Decl. ¶¶ 16, 18-19; Boos Decl. ¶¶ 4-5, 12; Howell Decl. ¶ 23; Lizardo Decl. ¶ 5; Olson Exp. Rep. ¶ 39. BCRA has further discriminated against SSFs by its failure to increase the maximum level of legal contributions to SSFs, as contrasted with BCRA's increases to the maximum level of legal individual contributions to federal candidates, which are also indexed for inflation. Pratt Decl. ¶¶ 16, 18-19; Boos Decl. ¶¶ 11-14. Individuals, including the individual Paul Plaintiffs, would also continue to be prohibited from contributing as much as they desire to facilitate the spread of ideas and policies which they support. Anon. Wit. No. 1 Decl. ¶¶ 4, 9.

49. Unlike the other classes of political actors regulated by BCRA, BCRA/FECA does not index for inflation donations made by or to PACs. Thus, inflation will gradually reduce the significance of PACs vis-a-vis other BCRA/FECA-regulated political presses. Pratt Decl. ¶ 18; Boos Decl. ¶ 13.

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